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A recent decision of the Supreme Court of Massachusetts, in the case of Attorney-General v. Williams, involved the constitutionality of a statute limiting the height of public buildings. The court declared the statute constitutional at the instance of the attorney-general representing the State, who took action in order to save from injury a public square adjoining the buildings threatened to be erected. The court held that the statute gives rights in the nature of an easement over lands facing Copley Square, which easement is annexed to the square for the benefit of the public, for whose use and enjoyment Copley Square was laid out; and that these rights are similar in their nature to rights in highways, in great ponds, and in navigable waters of the commonwealth. The broad view which the court took is indicated by the following expression, appearing in the opinion: The grounds of Copley Square "are to be enjoyed by the people who use them; they are expected to minister not only to the grosser senses, but also to the love of the beautiful in nature, in the varied forms which the change in season brings." The court further held that the prohibition against erecting a building above the height of ninety feet, not including the steeples, towers, domes, sculptured ornaments, and chimneys, was absolute.

Legislation against high buildings is not the outgrowth of the modern "sky-scraper," as might be supposed. Lanciani the noted Roman archæologist, has shown that a law was passed in Rome during the time of the Cæsars restricting the height of fronts of buildings to sixty feet. This law, however, was successfully evaded by leaving the fronts sixty feet, as required, but adding several stories to the rear portion. There were other laws enacted in olden times regulating the heights of buildings. The tendency was to diminish the height of stories as the buildings increased in size.

In an action before the New York Court of Appeals—Rice v. Butler, to rescind a contract for the purchase of a bicycle upon the ground of infancy, and to recover back a portion of the purchase price paid thereon, where it appeared that the value of the use of the machine during the time the infant had possession of it equalled the amount paid, it was held, reversing the lower court, that no recovery could be had. The question presented in this case is not free from difficulty. There are numerous authorities bearing upon the question but they are not in entire harmony. Kent, in his Commentaries (vol. 2, p. 240), says: "If an infant pays money on his contract and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other."

In the case of Gray v. Lessington, 2 Bosw. 257, a young lady during her minority had purchased a quantity of household furniture, paying about half of the purchase price, and had given her note for the balance. She subsequently rescinded the contract and sought to recover the amount that she had paid. She had had the use of the furniture in the meantime, and it was held that she must account for its deterioration in value. Woodruff, J., in delivering the opinion of the court, says: "When it becomes necessary for an infant to go into a court of equity, to cancel her obligations, or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property arising from its use is doing no more. Presumptively, she has derived from the use of the property a profit, or benefit, equivalent to such deterioration."

In the case of Medbury v. Watrous, 7 Hill, 110, an action was brought by an infant to recover for services performed of the value of $70. The defense was that the work was done in part performance of a covenant to purchase of the defendant a house and lot for the sum of $600. He had not entered into the possession of the house and lot and had received no benefits from the purchase. It was held that he could rescind the contract, and, having received nothing under

it, he could recover upon a *quantum meruit* for the work performed. Beardsley, J., in delivering the opinion of the court, refers to the rule laid down by Chancellor Kent, and then to the case of Holmes v. Blogg, 8 Taunt. 508, and says, with reference to the later case: "It was not shown what had been the value of the use of the premises demised while the infant remained in possession. If that was less than the sum paid by him it may well be that he ought to have recovered the difference." "It will thus be seen," says the New York court, "that the cases to which we have alluded recognize the principle which we think ought to be applied to this case, and that is that the plaintiff, having had the use of the bycicle during the time intervening between her purchase and its return, ought, in justice and in fairness, to account for its reasonable use or deterioration in value." The rule announced by the Massachusetts court in the cases of Pyne v. Wood, 145 Mass. 558, and McCarthy v. Henderson, 138 Mass. 310, was, in the judgment of the New York court, less equitable, and, therefore, should not be followed.

NOTES OF IMPORTANT DECISIONS.

TOWNS — POLLUTION OF STREAM.—In Watson v. Town of New Milford, 45 Atl. Rep. 167, decided by the Supreme Court of Errors of Connecticut, it was held that where a town discharges sewage from its public buildings into a stream which deposits the same on plaintiff's land, it cannot escape its share of liability therefor by showing that others more largely than it contributed to the nuisance. The court said in part:

"Towns may build town houses and any necessary outbuildings. Gen. St. sec. 130; White v. Town of Stamford, 37 Conn. 578, 586. If by connecting with a sewer they can save the expense of outbuildings, or better accomplish the purposes these might otherwise serve, a reasonable construction of the statute gives them the right so to do. School districts have similar powers, and in case of consolidation the town succeeds to the possession of their property and the responsibilities attaching to such possession. *Id.* tit. 35, chs. 135, 136; Pub. Acts, 1898, p. 410, ch. 345. A building owned by a municipal corporation could not be relieved of the rain water falling upon the roof by precipitating it through a spout upon the lands of adjoining proprietors. Their rights may be equally invaded by the discharge of sewage from it upon their premises. In these respects a municipality has no greater immunities than any private landowner. A nuisance was created upon the plaintiffs' land by the deposit of sewage, and sediment from sewage, offensive from its appearance or its smell. The use of the sewers which receive the surface drainage from highways, and of that built by the village improvement association by the defendant, to carry off the sewage from its public buildings, contributed to this injury. That others also contributed to it, and perhaps more largely, did not relieve the town from liability. Morgan v. City of Danbury, 67 Conn. 484, 496, 35 Atl. Rep. 499. That the plaintiffs suffered no personal inconvenience from the nuisance, because they did not reside in the vicinity, is immaterial. They were entitled to nominal damages, at least, for the offensive condition of things upon their land, even if they never visited it, and although its rental and selling value remained unimpaired. Watson v. Water Co., 71 Conn. 442, 42 Atl. Rep. 265. If those assessed can be regarded as substantial, they are still so small in amount that no new trial should be granted for their reduction. Buddington v. Knowles, 30 Conn. 26; Holbrook v. Bentley, 32 Conn. 508."

INSURANCE OF GROWING CROPS AGAINST LOSS BY HAIL.—In Barry v. Farmers' Mut. Hail Ins. Assn., 81 N. W. Rep. 690, decided by the Supreme Court of Iowa, the following points were decided: "The requirement of a policy of insurance against loss to growing corn by hail, that in case of partial loss a true account of the remaining portion shall be kept, is sufficiently complied with where only part of the tract has been harvested at the time it is desirable to know the amount by averaging the remainder with that already gathered.

"Where the loss under a policy of insurance against injury to growing crops by hail is to be considered, the difference between the amount grown on the damaged tract and a fair average crop grown on an equal, uninjured tract in the immediate neighborhood, evidence of the yield on lands in the neighborhood is admissible, though it does not appear that the tracts are of the same size or yielding capacity, or cultivated with the same care; this going only to the weight of the testimony.

"It being in issue whether plaintiff's grain was injured by hail, testimony of R, who had grain in a field cornering plaintiff's, as to whether he saw any evidence of hail in his grain on the day plaintiff claimed his crop was injured, is admissible.

"An adjuster of a company insuring against loss to growing grain from hail, who has examined plaintiff's crop, may testify, from his experience, whether it had been injured by hail; the question calling for a fact as to which he had knowledge, and of which he was competent to testify.

"Under a contract of insurance against injury to growing crops, requiring the loss to be esti-

mated in bushels, and at the market value, the recovery is the market value of that destroyed, less what it would have cost to prepare it for the market, though assured is required to take care of the remainder of the crop.

"The recovery under a policy insuring growing crops against loss by hail being the market value of that destroyed, less the expense of preparing it for the market, a verdict should be directed for the insurer, assured having given no evidence of such expense."

JOINT TORT-FEASORS.—In Grundel v. Union Iron Works, 59 Pac. Rep. 826, decided by the Supreme Court of California, it was held that the fact that some of the defendants, in an action in a State court for the wrongful death of plaintiff's intestate on a sailing vessel has made application, as the owners of the vessel, to a federal court, for a limitation of their liability under the United States statutes relating to the merchant marine, and that the federal court had enjoined plaintiff from further proceedings in the State court against these defendants, is not a bar to the plaintiff proceeding in the latter court against the other defendants, where he has received no satisfaction for the wrong complained of. The court said in part:

"The question presented on the appeal is whether the plaintiff, with a cause of action alleged in the complaint to be for $50,000 damages, is barred from recovery of a proper measure of damages, as against the respondents herein, in consequence of the proceedings in the federal court by the nine defendants, the owners of said vessel, in which their liability is limited to the appraised value of said vessel. The plaintiff has not actually received satisfaction in any amount, nor what in law is deemed the equivalent of satisfaction. The law as to the liability of joint tort-feasors is thus stated by Black on Judgments: 'The general rule followed in America is that the liability of two or more persons who jointly engage in the commission of a tort is joint and several and gives the same rights of action to the person injured as a joint and several contract. Consequently, a judgment recovered against one of two joint tort-feasors, remaining unsatisfied, is no bar to an action against the other for the same tort.' 2 Black, Judgm. sec. 777. Judge Cooley, in his work on Torts (2d Ed. p. 159), says: 'The rule laid down by that eminent jurist, Kent, in Livingston v. Bishop, 1 Johns. 290, which has since been generally followed in this country, is that the party injured may bring separate suits against the wrongdoers, and proceed to judgment in each, and that no bar arises to any of them until satisfaction is received. * * * It is to be observed, in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more of the others, that the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has received satisfaction, or what in law is deemed the equivalent.' In Dawson v. Schloss, 93 Cal. 199, 29 Pac. Rep. 31, the plaintiff had recovered a judgment in the sum of $5,000 against Schloss and Hinkle in an action for malicious prosecution. A new trial was granted as to defendant Schloss, which resulted in a verdict and judgment against Schloss for $3,000, and he appealed from the judgment. At the time of the second trial, the original judgment for $5,000 against Hinkle was of record and unsatisfied. It was contended by the appellant that no judgment should have been rendered against Schloss on the new trial, so long as the original judgment existed against Hinkle; that, while separate suits may be brought against each of several joint tort-feasors, yet, if the defendants are sued jointly, there can be but one verdict and judgment. This court answered this contention that 'such is not the prevailing rule in the United States,' quoting from Judge Cooley the above cited paragraph. The court, continuing, says: 'There is no pretense that any part of the judgment against Hinkle has been paid or satisfied, or even that execution has been taken out upon the judgment.' Nichols v. Dunphy, 53 Cal. 605, was an action in tort. A judgment had been obtained against defendants. One of the defendants appealed and secured a reversal of the judgment. Thereupon the other defendant, against whom execution had been taken out, moved for an order quashing the execution. That motion was granted, on the theory that there could not be a several judgment when the action had been joint. Discussing the action of the court below, this court says: 'We think the court erred in quashing the execution against Carmen. The judgment against her was unaffected by the appeal of her co-defendant and the subsequent proceedings thereon.' In Butler v. Ashworth, 110 Cal. 614, 43 Pac. Rep. 386, it is said: 'If one be injured by a tortious act, he is entitled to compensation for the injury suffered, and if several persons are guilty in common of the tort, the injured one has his right of action for damages against each and all of the joint tort-feasors, and may, at his election, sue them individually or together.' In case one of the wrongdoers has become bankrupt or insolvent, the effect as to him would be to limit the liability to the available assets of his estate, which might be merely nominal. His bankruptcy proceeding, however, would not have the effect of discharging the solvent wrongdoers. Nothing short of satisfaction in some form constitutes a bar in a proceeding like the present."

MORTGAGE—GROWING CROPS—SEVERANCE.—The Court of Appeals of Maryland hold, in Wootton v. White, that a purchaser of land at foreclosure is entitled to crops growing at time of the sale, unless expressly reserved; and that a mortgagor of land cannot, before an actual severance of a growing crop, defeat, by sale, the right of

the mortgagee to sell the crop on foreclosure, or of the purchaser to claim it. The court says in part:

"The question is, did the appellant acquire under the bill of sale a title to the growing crop,—a title which was paramount to that of the mortgage, and therefore superior to any right which the purchaser at the mortgage sale took by virtue of that purchase? If the title which the bill of sale gave to the appellant was subordinate to the lien of the mortgage, then, obviously, the judgment denying the appellant's right to recover the value of the wheat from the purchaser of the mortgaged premises was correct, as there is no pretense that the crop was excepted or reserved from the mortgage sale. If, on the other hand, the bill of sale gave to the appellant a title superior to the lien of the mortgage, it must have been because either the lien of the mortgage did not attach to any crops planted after the execution and delivery of the mortgage, or because the execution and delivery of the bill of sale operated at law and in equity as a severance of the actually growing crops, converted them into detached personal property, and thereby exempted or subtracted them from the lien which attached when they were planted and annexed to the freehold. There is no other alternative. The first has not been, and could not be, contended for, because, though for some purposes growing crops are treated as personal property, and therefore are not within the fourth section of the statute of frauds, they none the less partake of the nature of the realty, and under a conveyance pass with the soil to which they are united, unless expressly reserved. Coombs v. Jordan, 3 Bland. 303, 8 Am. & Eng. Enc. Law (2d Ed.), 303, 304. The general rule of the common law is that growing crops form a part of the real estate to which they are attached, and from which they draw nourishment, and, unless there has been a severance of them from the land, they follow the title thereto.

There was no actual severance of this growing wheat until after the ratification and confirmation of the mortgage sale, and it comes to the question whether the execution and delivery of the bill of sale in February, 1897, operated as a constructive severance of the crop that did not mature until the summer of that year, and whether, by force of that bill of sale, the crop, which, unquestionably, but for the bill of sale, would have passed to the purchaser of the soil at the mortgage sale, was excluded from the lien of the mortgage, and was vested in the appellant. We have just said that the growing crop would unquestionably have passed to the purchaser at the mortgage sale, had there been no bill of sale. This is incontestably the law. 'The purchaser is entitled to the crops growing at the time of the sale to him, in preference to the mortgagor, or any one claiming under him whose claim originated subsequently to the mortgage.' 2 Jones, Mort. § 1658. The author cites the following cases: Shepard v. Philbrick, 2 Denio, 174; Jones v. Thomas, 8 Blackf. 428; Lane v. King, 8 Wend. 584; Batterman v. Albright, 122 N. Y. 484, 25 N. E. Rep. 856, 11 L. R. A. 800; Crews v. Pendleton, 1 Leigh, 297; Parker v. Storts, 15 Ohio St. 351; Anderson v. Strauss, 98 Ill. 485; Rankin v. Kinsey, 7 Ill. App. 215; Scriven v. Moore, 36 Mich. 64; Calvin v. Shimer (N. J. Ch.), 15 Atl. Rep. 255; Beckman v. Sikes, 35 Kan. 120, 10 Pac. Rep. 592; Perley v. Chase, 79 Me. 519, 11 Atl. Rep. 418; Montgomery v. Merrill, 65 Cal. 432, 4 Pac. Rep. 414; Kerr v. Hill, 27 W. Va. 576; Haydon v. Burkemper, 101 Mo. 644, 14 S. W. Rep. 767; Downard v. Groff, 40 Iowa, 597; Sherman v. Willett, 42 N. Y. 146.

"It is true that there are cases in some of the other States which hold that the execution of a bill of sale, under the circumstances set forth in this record, works a severance of growing crops; but they are founded either upon some statutory provision, or upon a view of the relation between mortgagor and mortgagee which does not obtain in Maryland. It must not be forgotten that we are not dealing now with the rights which the personal representative of a deceased owner of land has to the crops maturing after the death of the owner, nor with the right of a creditor to seize and sell growing crops, nor with the power of the owner of such crops to sell them by parol when there is no mortgage binding them. These are all aside of the question before us; and that question, to repeat it by way of emphasis, is, can a mortgagor, who has planted crops that have become subject to the lien of a prior mortgage on the land, constructively sever that crop before it matures or ripens, by merely executing and delivering a bill of sale of the uncut crop to a third party, so as to defeat the mortgagee's or the purchaser's right to claim the crop after he has purchased the land at a foreclosure sale made before the actual physical severance of the crop? The doctrine is definitely settled in Maryland that the mortgagor, while in possession, and before foreclosure, is regarded as the real owner of the property, except as against the mortgagee. Though in dealings with third parties the mortgagor may be treated as the owner of the mortgaged premises, he is not so considered when the rights of the mortgagee are concerned. As between the mortgagor and mortgagee, 'by the legal, formal mortgage * * * the property is conveyed or assigned by the mortgagor to the mortgagee, in form like that of an absolute conveyance, but subject to a proviso or condition; * * * and upon non-performance of this condition the mortgagee's conditional estate becomes absolute at law, and he may take possession thereof, but it remains redeemable in equity during a certain period.' Duval v. Becker, 81 Md. 546, 32 Atl. Rep. 308; Bank v. Lanahan, 45 Md. 407. It is obvious, then, from this relation, that it is no more within the power of the mortgagor to impair the value of the mortgagee's security by cutting out from the lien of the mortgage, and transferring to a third party, discharged of that lien, a growing crop, which, if unsevered, will

pass with the land at a foreclosure sale, than it is lawful for him to strip the mortgaged property of its appurtenant easements, as was unsuccessfully attempted in Duval v. Becker. So long as the crop remains physically unsevered, it partakes of the nature of the realty, as between the mortgagor and mortgagee. It forms part of the latter's security for the payment of the debt, and all persons dealing with the mortgagor in respect to it while it remains actually attached to the freehold deal subject to all the rights of the mortgagee, unimpaired and unaffected. Martin v. Martin, 7 Md. 377. This must, in the very nature of things, be so. If the mortgagor may, by the execution of a bill of sale, constructively sever a growing crop planted after the date of a mortgage then in default, and by that act can prevent the purchaser from taking the crop when he buys at foreclosure sale the mortgaged property, with the crop still growing thereon, then the mortgagor has it in his power to lessen the security held by the mortgagee; and subsequent judgment creditors of the mortgagor could, by seizing the crop and selling it under execution, produce precisely the same result. But this latter cannot be done if there has been no actual severance before a foreclosure sale. Batterman v. Albright, 122 N. Y. 484, 25 N. E. Rep. 856, 11 L. R. A. 800, and cases in note. So comprehensive is the rule as to growing crops passing to the purchaser of the land, that even the crops planted by a tenant of the mortgagor after the date of the mortgage pass to the purchaser of the realty upon a foreclosure of the mortgage while the crops are still standing. 8 Am. & Eng. Enc. Law (2d Ed.), 307, and cases in note.

"It will be observed that we are dealing only with the question whether a mortgagor may by a bill of sale constructively sever a growing crop, so as to prevent it from passing to a purchaser under a foreclosure sale, when the sale of the land is made before the crop is actually cut therefrom. That he may effectually part with the title to a growing crop, so as to preclude a subsequent mortgage from attaching to it, may be conceded, without affecting the decision of this case. We only mean, however, to hold that, owing to the relation existing between mortgagor and mortgagee in Maryland, the former cannot, before an actual severance of a growing crop, defeat, by the execution of a bill of sale, the right of the mortgagee of the land to sell the crop on a foreclosure, or of the purchaser at such a sale to claim the crop. There is no hardship in this. If the mortgagor goes on and makes preparation for a crop, he does it with a full knowledge that the land, with the crop, is subject to be sold, if the sale takes place before he severs it. Nor does he lose anything by this, for the crop on the land enhances the price. If by this increase the debt be overpaid, he gets the surplus. If not, still the full value of his labor goes (as he had agreed it should go) to the payment of the debt secured by the mortgage. Crews v. Pendleton, *supra*. In 1 Jones, Mortg. § 697, it is said: 'But growing crops are personal property, when severed from the land, and a sale or mortgage of them by the mortgagor amounts to a severance. Several New York cases are cited to support this proposition, and among them is Sexton v. Breese, 135 N. Y. 387, 32 N. E. Rep. 133.' The case not only does not go the length of the text, but sustains the conclusion we have reached. The facts were these: The owner of a farm upon which was a mortgage sold to a third party a crop of wheat growing thereon, the bill of sale giving to the purchaser the right to secure and harvest the crop. Subsequently the owner of the farm (the mortgagor) executed to the mortgagee a written instrument authorizing the mortgagee to take possession of the farm, rent the same, and apply the proceeds on the mortgage. The person who purchased from the mortgagor, under the bill of sale, the growing wheat crop, went upon the farm to cut the wheat, but was prevented from doing so by the mortgagee, who harvested it; but the purchaser entered and carried it away. In an action of replevin by the mortgagee against the purchaser under the bill of sale, it was held that the latter was entitled to the crop. There had been no sale under the mortgage. The court, in the course of its judgment, said: 'Probably the right of a third person to the growing crops of grain, under a contract of purchase with the owner, would be annulled by the sale upon the foreclosure of a mortgage of the land, according to the decisions in Shepard v. Philbrick, 2 Denio, 174, and Lane v. King, 8 Wend. 584; for then the transfer of the title to the mortgaged premises would carry with it to the purchaser a paramount title to the growing crop. But in the present case that proposition is not before us, and the title of the mortgagor to the mortgaged land was not devested or transferred to the mortgagee with the possession.'"

THE LAW GOVERNING THE USE OF THE BICYCLE.

A bicycle is defined by the courts of this country to be a vehicle or a carriage.[1] In the absence of legislative enactments, the riders of bicycles have the same rights, are subjected to the same duties and liabilities which the law gives and imposes on the users of other vehicles.[2] Although but few courts have passed upon and defined the rights, duties and liabilities of the riders of bicycles, yet as a vehicle the bicycle is brought at once

[1] Swift v. City of Topeka, 43 Kan. 671, 23 Pac. Rep. 1075. The Oregon legislature has defined a bicycle to be "a vehicle propelled by a rider by foot power." Laws of Oregon, 1899, § 12.

[2] Thompson v. Dodge, 60 N. W. Rep. 545.

within the common law principles, so that it can now be said, that the law of the bicycle is an application of the old and settled principles to new conditions, and that the riders of bicycles are upon an equality with, and are governed by, the same rules as persons riding or driving any other vehicle; for every citizen has the absolute right to choose for himself the mode of conveyance he desires, subject to the condition that he will observe the law of the road. Those who adopt improved methods of transportation or locomotion are not barred from doing so, if these improvements are not subversive of the rights of the other members of the public, and it is now well settled that the bicycle has as good a right upon the public highway as any other vehicle. A person riding a bicycle in any part of the street or highway used for the passage of vehicles, is exercising his legal right to its use.[3] The owner, driver, or rider of any vehicle using the highway is required to exercise due care—that care which reasonably prudent men use and exercise in the management of the ordinary affairs of life.[4] The customary law of the road, to turn to the right when meeting or passing vehicles going in the opposite directions, and to pass vehicles going in the same direction on the left, is to be regarded. This is the statute law of most of the States. However, the law of the road is not an inflexible rule. A traveler may use any part of the highway if no other person is occupying it contemporaneously. A bicyclist is not bound to turn to the right, rather than the left unless he is about to meet another person. If a collision can be avoided by using the wrong side of the highway it is justifiable, and not only justifiable, but it is obligatory. This is the rule where a light vehicle, as a bicycle, gives way to a heavier one, for it is unreasonable to require a person driving a heavy load to go as far out of the traveled path as the one who is controlling a light vehicle. Traveling on the wrong side of the highway may be negligence, and yet, one traveling on the right side of the highway, simply because he may have the right of way, does not authorize the running down of another, though the other be in fault. However, in a collision between a bicyclist and an express wagon, it is immaterial whether the wagon was on the right side of the highway, or not, where the bicyclist was riding along with his head down, and paying no attention to where he was going.[5] Where a bicyclist riding at the rate of three miles an hour on the right side of the highway, meets a party driving a buggy on the wrong side of the highway, and the driver refuses to turn out, and a collision resulted, the bicyclist being on the right side of the highway was justified in supposing that the driver would obey the law, and turn out, and therefore was not guilty of negligence in not turning out until the driver was upon him.[6] And where a bicyclist traveling on the right side of the highway, meets an express wagon being driven on the wrong side and a collision occurred, the driver of the wagon was found guilty of violating the law of the road.[7] The person who is on the wrong side of the highway in cases of collision has the burden of proving that he exercised due care; for the one who is traveling on the right side has the right to expect that the one coming toward him will obey the law and turn out. A person who voluntarily rides on the wrong side of the highway, and is unable to surrender to such as he may meet on the way, the portion of the highway to which they are entitled, cannot in all probability give a legal excuse, if any injury results, or any damages occur. The wrong consists in placing himself where he cannot recover, and where the other party has the right to go. Where parties meet on the sudden, and an injury or damage results, the one on the wrong side should be held to answer, unless it clearly appears that the party on the proper side had ample time or opportunity to prevent the injury. The obligation to keep to the right is limited to those persons who are visible or expected, and consequently the rule does not apply where there are no others of whom the traveler has notice.

There is no settled rule of law governing the overtaking and passing of vehicles going in the same direction, but custom seems to have established the regulation that the one who attempts to pass a vehicle going in the

[3] Macomber v. Nichols, 34 Mich. 212; Swift v. City of Topeka, 43 Kan. 671, 23 Pac. Rep. 1075; Thompson v. Dodge, 60 N. W. Rep. 545; Densmore v. Erie City (Pa.), 7 Dist. Rep. 356.

[4] 2 Jaggard on Torts, 877.

[5] Rowland v. Wanamaker, 7 Pa. Dist. Rep. 249.

[6] Schimpf v. Sliter, 46 N. Y. St. Rep. 225.

[7] Quinn v. Pietro, 56 N. Y. S. 419; State v. Collins, 16 R. I. 371, 17 Atl. Rep. 131.

same direction must pass to the left. The foremost person, on request, should yield room for the hindmost to pass in, and yet the foremost person is not obliged to turn out unless there is adequate room. While there has been some doubt expressed as to the correct application of this rule, yet there can be no question that it is a sensible rule to apply between the riders of bicycles and the drivers of other vehicles. But riders of bicycles, as well as the drivers of vehicles, must warn the party to be passed, of the intention to pass from behind, so that each may be able to exercise care.[8]

Pedestrians have equal rights in the use of the streets, with those riding or driving vehicles.[9] Neither has any priority of right over the other. They owe to each other the duty to avoid collisions. A rider of a bicycle when approaching a pedestrian, on a street crossing, or meeting or passing on a sidewalk, must warn the pedestrian of his approach by means of a bell, or by other means, and a failure to do so causing a collision is negligence.[10] A bicyclist in such a case may be guilty of assault and battery. The reason of the rule is that other vehicles make a noise when in use, and people are, therefore, made aware of their approach; while the bicycle, when in use is noiseless, and has been properly called the "silent steed." Some of the States and cities require all wheelmen to carry on their bicycles a bell at all times, and a lamp at night. The Supreme Court of the State of Iowa in a late case held that "one who rides a bicycle without a light or signal of warning, in a public thoroughfare, when he is liable to meet moving vehicles, or pedestrians at a time when objects can be discerned readily only a few feet distant, is guilty of negligence."[11] Riders of bicycles must use due care in passing over street crossings, especially in the crowded streets of the cities. In crossing from the right side of the street or highway to the left side, one who is traveling on the right side has the right of way over the one crossing, and it is the duty of the latter, in making his intrusion upon that side, to do so in a manner that will not endanger others. He is bound to exercise care. If any damage or injury results, from such intrusion, the intruder will be held liable. Cases of this kind frequently occur in the cities. Care should be exercised by riders in passing street cars stopped on street crossings, unloading passengers. Riders when turning corners to the left should keep to the outside of the street, and when turning to the right keep as far out from the corner as is necessary.

Numerous cases have arisen, and been decided by the courts of last resort, concerning the rights of bicycles upon the tracks of street railways. Riders have a right to cross the tracks, and even ride between them as freely as if they were a portion of the highway, but they must take due notice of the approach of cars running thereon.[12] A bicyclist riding between the tracks of an electric street railway without watching for the approach of cars has been held guilty of negligence.[13] For in riding along a line of railway, where cars are passing or likely to pass, at frequent intervals, one must exercise due care and diligence to avoid danger. That is, he must look and listen to ascertain if danger is threatened, and if he fail to do so and is injured his negligence will bar his recovery.[14] So a bicyclist who attempted to cross a street car track, in front of a rapidly approaching car in plain sight, is not in the exercise of due care.[15]

A person who uses the public highway is under certain restrictions as to speed. The use of immoderate speed upon the highway is negligence. The rate of speed must be moderate, and while a moderate rate of speed cannot be defined in terms of miles per hour, yet it should be proportioned to the danger, and the place where one is traveling. A rate which in one place would indicate negligence might in another place, or under different circumstances, be neither reckless nor negligent. The rider of a bicycle riding at an immoderate rate of speed is guilty of negligence.[16] The rule that the

[8] Brennan v. Richardson, 56 N. Y. S. 428; Young v. Cowden (Tenn.), 40 S. W. Rep. 1088; Stanfield v. Anderson, 43 Pac. Rep. 221.

[9] Jennings v. Schwab, 2 Mo. App. Rep. 923.

[10] Mercer v. Corbin, 117 Ind. 450.

[11] Cook v. Forgaty, 72 N. W. Rep. 677.

[12] Keitel v. St. Louis C. Ry. Co., 28 Mo. App. 657.

[13] Everett v. Los Ang. Ry. Co. (Cal.), 43 Pac. Rep. 207.

[14] Cardonner v. M. St. Ry. Co., 49 N. Y. S. 527; Lurie v. M. St. Ry. Co., 40 N. Y. S. 1129.

[15] Chicago N. S. St. Ry. Co. v. McCarty, 66 Ill. App. 667.

[16] Mercer v. Corbin, 117 Ind. 450.

driver of a vehicle is bound to have his conveyance and tackle reasonably safe and sound, applies to the bicycle. The law has generally denied the right of bicyclists to use the sidewalks of the cities, as they are reserved for pedestrians, and a bicyclist cannot claim the privileges of both.[17] However, where the use of the sidewalk is granted the bicycle, greater care is exacted from riders than when they use that portion of the highway usually devoted to vehicles.

Portland, Oreg. FRANK S. GRANT.

[17] Mercer v. Corbin, 117 Ind. 450.

APPEAL IN CASE OF CONVICTION ON INFORMATION IN MISSOURI.

The Supreme Court of Missouri, in State v. Brown, 55 S. W. Rep. 76, very recently held that, "since Rev. St. 1889, sec. 4277, providing for appeals in criminal cases, authorizes an appeal to the supreme court only where defendant is convicted on a charge contained in an indictment, no appeal lies from a conviction on a charge contained in an information." The gist of the opinion is in these words: "The only section in relation to a defendant taking an appeal is where he is convicted on a charge contained in an indictment. Sec. 4277, Rev. St. 1889. The right of appeal does not exist except as the result of statutory enactment. There is no such enactment as to information, and the right of appeal was unknown to the common law. * * * For these reasons no appeal lay from the Barton circuit court, and the appeal taken therefrom is hereby dismissed." Is not the court in error in saying there is no statutory authority authorizing an appeal from a conviction on a charge contained in an information? Chapter 48 of the Rev. St. of Mo. for 1889 is entitled: "Criminal Cases, Practice and Proceedings In." Section 4062 of this chapter, the same chapter in which is found section 4277, provides: "The trial and all proceedings upon any information filed in a court of record shall be governed by the law and practice applicable to trials upon indictment for misdemeanors." This section has never been construed, and we have therefore no authoritative declaration as to its meaning, and whether it does, or does not, give the same right of appeal to one convicted of a misdemeanor, upon a charge made in an information, that he would have had he been prosecuted and convicted for the same offense upon an indictment. The supreme court's opinion in State v. Brown cannot be considered as a construction of this section (4062) since it is not mentioned in the opinion and evidently was not brought to the court's attention. The word "proceedings" in this section of the statutes should be construed as including "appeals," and therefore to give the same right of appeal from a conviction upon an information that section 4277 gives upon a conviction for a misdemeanor upon an indictment, for these, amongst other reasons: 1. "Procedure" or "proceedings" in relation to legal matters is a generic term and includes matters of practice, as well as pleading and evidence. Kansas City v. O'Connor, 36 Mo. App. 594. Bishop in his work on "Criminal Procedure" likewise so construes the word "procedure" (sec. 2), and in Book 10, of vol. 1, under the title: "The Ordinary Proceedings after Verdict" treats of appeals. Therefore the language of section 4062 should, by the usual rules of construction, give the right of appeal to one prosecuted to conviction upon an information. 2. The constitution of 1865 (art. 1, sec. 24), permitted the prosecution for a misdemeanor by either information or indictment without restriction of any kind. The constitution of 1820 had a provision identical with that of the constitution of 1860. See article 13, sec. 14, of Const. of 1820. These provisions, as the supreme court held, in State v. Cowan, 29 Mo. 330, permitted the legislature to grant to a municipal corporation the power to proceed criminally by information against persons charged with misdemeanors, although the general law of the State provided that such offenses should be prosecuted by indictment. The opportunity for discrimination in the administration of the criminal laws which this power gave by permitting, for example, an appeal if one form of procedure was adopted, and forbidding it in the other, is apparent. The constitution of 1875 evidently was intended to remedy this evil, for it provides that misdemeanors shall be prosecuted "by indictment or information as concurrent remedies," a limitation not found in either of the previous constitutions of Missouri. This constitutional requirement clearly prevents the legislature from withholding from a defendant prosecuted for a misdemeanor by either of these means any substantial right granted to those proceeded against by the other. Section 4062 appears amongst our statutes for the first time in 1877, and was put there at the first meeting of the General Assembly after the adoption of the present constitution, while section 4277 was enacted in 1835. The language of the first section of the act of 1877 is significant, and evidences, in my opinion, a purpose to meet the new requirements of the constitution as to prosecutions for misdemeanors. It says: "Hereafter all misdemeanors shall be prosecuted in the courts having jurisdiction thereof, either by indictment, as now provided by law, or by information as provided by this act, as concurrent remedies." Section 10 of the act contains the provisions of section 4062, Rev. St. 1889, in almost its exact language. Can there be any doubt that section 4062 was meant to meet, and does meet, the constitutional mandate that prosecutions for misdemeanors may be by indictment or information, but

they must in each case secure to the defendant, however proceeded against, all the substantial rights possible under either mode of procedure? State v. Cowan shows the necessity for a provision of this kind, and the decision in State v. Brown, demonstrated the wisdom of the constitutional provision, which section 4062 was evidently intended to meet, because no sooner was the decision in the Brown case announced, than it was pointed out that the local prejudice against certain misdemeanors, as, for example, running "slot machines," could be taken advantage of by prosecuting those guilty of them by information instead of by indictment, and thus cut off the defendants from appeal. The St. Louis Court of Appeal, in State v. Wood, 3 Mo. App. Rep. 134, and State v. Boggess, *Id.*, followed State v. Brown as a controlling decision. But I respectfully suggest that, in view of the constitutional provision to which attention has been called, the right to appeal from a conviction for a misdemeanor, upon a prosecution by information, is a constitutional question, and all cases involving that question should go to the supreme court until it has expressly interpreted that provision of the constitution which permits the prosecution for misdemeanors to be by indictment or information, but requires that they shall be "concurrent remedies."

St. Louis. GEO. R. LOCKWOOD.

SALE—WARRANTY.

HOFFMANN v. DIXON.

Supreme Court of Wisconsin, January 9, 1900.

1. A customer applied at a store for rape seed, and in response to an inquiry as to whether such seed was there kept for sale was informed in the affirmative by the person in charge, who produced seed as being of the kind called for, whereupon such customer purchased some of such seed, acting wholly on the faith of the representations thus made as to its character. Held, that the conduct of the merchant was in effect an affirmation of fact as to the character of the article offered for sale and an express warranty in that regard, whether he knew the truth in that regard or not.

2. If a person offer an article for sale, accompanying such offer with an affirmation of fact, or acts equivalent to such affirmation, as to the identity of such article, for the purpose of making a sale thereof to another, and such other, relying on such affirmation, purchase such article, and such affirmation be false to the injury of the purchaser, he may hold the vendor liable for damages for breach of warranty or actionable fraud, without regard to whether such vendor made the affirmation knowing it to be false or not.

MARSHALL, J.: Action to recover damages for breach of warranty on the following facts: Plaintiff, a farmer, by Martin L .Hoffman, Jr., his son, who was duly authorized thereto, applied to the defendant, a country merchant who kept seeds for sale, among other things, to buy some rape seed. The business on the part of defendant was done by one of his regular clerks. Mr. Hoffman asked the clerk if they had rape seed for sale. He replied in the affimative, whereupon Mr. Hoffman said he would take 25 pounds. The clerk thereupon produced a sack of seed and weighed out the desired amount in Hoffman's presence. Neither Hoffman, the clerk, the defendant, nor plaintiff knew rape seed from wild mustard seed, and each was wholly unaware of the ignorance of the others. Hoffman purchased the seed relying upon the fact that it was produced by the clerk and sold to him as what he called for. The seed was delivered at plaintiff's farm and was there, either by him or by his authority, sowed upon his land. He did not examime the seed, and would not have been wiser if he had, as he was entirely unacquainted with the appearance of rape seed, as before indicated. He used the seed relying upon the fact that it was sold as rape seed. The seed was in fact wild mustard seed. It befouled plaintiff's land to his injury. The facts stated were established by evidence, as was the damage to plaintiff, sufficiently to enable the jury, under proper instructions, to determine the truth in regard to plaintiff's recoverable loss. A motion was made for a nonsuit at the close of the evidence, which was granted, and judgment was rendered accordingly. Plaintiff appealed.

The learned circuit judge, in granting the nonsuit, followed Seixas v. Wood, 2 Caines, 48, and a few other authorities in this country in harmony therewith, most of such authorities being decisions of the Supreme Court of Pennsylvana to the effect that, in the sale of an article, with opportunity on the part of the vendee to inspect it before purchasing, the vendor being neither the manufacturer nor producer of such article, the maxim *caveat emptor* applies both as to the quality and identity thereof. The Seixas case was decided in 1804. Kent, J., who wrote the opinion, grounded the decision on Chandelor v. Lopus, Cro. Jac. 4, decided in 1603, where it was held that if a person sell a thing for what it is not, falsely but innocently misrepresenting its species, no action will lie against him to make good his representations. The case was this: The plaintiff sold a jewel, affirming as a fact, in order to make the sale, that it was a bezoar stone, which it was not. It will be noted that the doctrine of that case is directly contrary to the modern rule that he who falsely affirms the existence of a material fact in regard to an article offered by him for sale, for the purpose of making a sale thereof, which affirmation is relied upon without negligence by the purchaser, to his damage, is guilty of an actionable fraud. As was said by this court in effect, in Cotzhausen v. Simon, 47 Wis. 103, 1 N. W. Rep. 473, if representations by a vendor be material and false, and the vendee rely upon them to his injury, he may recover of the vendor on the ground of fraud the damages he sustains thereby which are the natural and proximate re-

sults of the wrong; and such is the case whether the falsehood be willful or not, for a vendor has no right to make even a mistake in facts material to a contract except under penalty of responding in damages. The law is quite well-settled in this State contrary to the ancient rule upon which the Seixas case was decided, on the subject of whether the positive assertion of a fact, made to induce a sale, may constitute a warranty, as that it may an actionable fraud, regardless of any element of intentional wrong. Austin v. Nickerson, 21 Wis. 542.

This opinion might be extended to great length by a review of the cases on the subject under consideration, but we shall forego any long discussion of the matter. The Seixas case was overruled in Hawkins v. Pemberton, 51 N. Y. 198. The law as there stated has been since followed in New York. White v. Miller, 71 N. Y. 118. In the Hawkins case it was said that the court in Seixas v. Wood followed Chandelor v. Kopus, Cro. Jac. 4, the doctrine of which being that a mere affirmation as to the character or quality of goods sold will not constitute a warranty, and that such doctrine has been long since overruled in this country and England; citing Hil. Sales, 237; 2 Kent, Comm. (Comstock's Ed.) 633, note a; 2 Smith, Lead. Cas. (5th Am. Ed.) 238; Bradford v. Manley, 13 Mass. 139; Stone v. Denny, 4 Metc. (Mass.) 151. The following cases will show that the doctrine of Chandelor v. Lopus is not recognized as good law by the English courts. Allan v. Lake, 83 E. C. L. 560; Barr v. Gibson, 3 Mees. & W. 390; Shepherd v. Kain, 5 Barn. & Ald. 240; Bridge v. Wain, 1 Starkie, N. P. 505; Power v. Barnham, 4 Adol. & E. 473. In Allan v. Lake there was a sale of turnip seeds as Skirving's Swedes. The plants grown from such seeds were of a kind other than the variety known as Skirving's. The question presented was whether the sale of the seed as being of a particular kind constituted a warranty, and on that Coleridge, J., said, in substance, that the statement regarding the kind of seed sold, which accompanied the sale, was a warranty, not a mere representation; that if it were limited to an assertion that the seed was turnip seed, it would, without doubt, constitute a warranty of the seed being turnip seed; and on the same principle, the assertion that the seed was turnip seed of a particular kind was an undertaking that it should answer that description. White v. Miller, *supra*, referred to that as the modern and correct doctrine, it being there said that, "a dealer who sells an article, describing it by the name of an article of commerce, the identity of which is not known to the purchaser, must understand that the latter relies upon the description as a representation by the seller that it is the thing described, and that constitutes a warranty."

With but few exceptions, which we shall not take time or space to refer to specifically, the judicial authorities and the text writers as well are in harmony with the foregoing. Bid. War. § 108. That rule is just. It holds a dealer responsible for breach of contract when he sells a thing as being of a particular kind, if it does not answer the description, the vendee not knowing whether the vendor's representations are true or false, but relying upon them as true. There is no good reason why a dealer should be permitted to exhibit seed to his customers, asserting it to be rape seed when it is something else, and then protect himself from the consequences of his falsehood by a plea of ignorance. The injury by the deception is just as great whether it be willful or innocent. The customer has the same right to rely upon the representation in the one case as in the other. Knowledge on the part of the vendor is not essential either to actionable fraud or a contract of warranty.

Applying the principle stated to the facts of this case, what was the contract between the parties? Upon what did their minds meet? The answer must be, that the defendant would sell to the plaintiff rape seed and that the seed delivered was of that kind. Opportunity on the part of the plaintiff to inspect does not militate against his right to insist upon the condition of the contract as to the identity of the article delivered being made good, since he relied wholly on his contract, not knowing whether the article he received answered such condition or not, and not being chargeable with negligence because he did not know. In such a case the doctrine of implied warranty does not apply, but the doctrine of express warranty does. No particular form of expression or words is necessary to make an express contract of warranty. The word "warranty" is not necessary to it. An affirmation of the fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant but upon which he relies in purchasing such article, is as much a binding contract of warranty as a formal agreement using the plainest and most unequivocal language on the subject. In Benj. Sales (6th Ed.), pp. 623, 625, as conclusions from a review of authorities in this country and England, including the New York cases overruling Seixas v. Wood, it is said: "All agree that any positive affirmation of a material fact as a fact, intended by the vendor as and for a warranty, and relied upon as such, is sufficient" to constitute a warranty. "The better class of cases hold that a positive affirmation of a material fact as a fact, intended to be relied upon as such and which is so relied upon constitutes in law a warranty, whether the vendor mentally intended to warrant or not." The latter is the doctrine of this court, as indicated by numerous cases where it has been applied. Austin v. Nickerson, *supra*; Gilfert v. West, 33 Wis. 617; Neave v. Arntx, 56 Wis. 174, 14 N. W. Rep. 41; White v. Stelloh, 74 Wis. 435, 43 N. W. Rep. 99.

It follows from the foregoing that the decision of the trial court that the doctrine of *caveat emptor* applies to the facts of this case, and that the evidence does not justify a finding that the defend-

ant warranted the seed to plaintiff to be rape seed and that he was entitled to recover for a breach of it, was erroneous, and the nonsuit was improperly granted. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

NOTE.—*Recent Cases on Warranties as to Character and Description of Articles Sold.*—A vendor with full knowledge of the capacity of an engine, is liable for breach of warranty to one who purchased it for running a threshing machine, relying on his representation that it was suitable for that purpose, when in fact it was not. Rose v. Meeks (Iowa), 59 N. W. Rep. 30. Defendant returned to plaintiff an engine purchased by him, and told plaintiff that it used too much steam, that it was not as economical as represented, that the boiler was not big enough, and would not furnish steam enough. Plaintiff then said that if defendant would get a certain sized boiler he would guaranty that the engine would do the work, and as economically as any other engine. Defendant bought such boiler, and used the engine over eight months. Held that, whether there was a warranty, and, if so, whether defendant relied on it in good faith, were questions for the jury. Dake Engine Mfg. Co. v. Hurley (Mich.), 57 N. W. Rep. 1044. On a sale of flax seed to be planted for a crop, there is an implied warranty that the seed is of a kind that will grow; and, if it does not do so with good husbandry, a note given for the purchase price fails for want of consideration, and the seller can maintain no action thereon. Johnson v. Sproull, 50 Mo. App. 121. The rule that the seller of a machine intended for a particular purpose impliedly warrants its fitness for that purpose does not apply when the contract of sale contains a special warranty of the quality and capacity of the machine, requiring the purchaser, after a specified trial, to notify the seller of its defectiveness or to return the same. Boyer v. Neel, 50 Mo. App. 26. When a manufacturer, by formal written contract, warrants merely the construction and finish of the article ordered according to the specifications, he does not warrant the article to be fit for the use intended. Milwaukee Boiler Co. v. Duncan (Wis.), 58 N. W. Rep. 232. A contract for bricks, at a stipulated price per thousand, "of the grade known as 'common brick,'" all to be "of good quality, and equal to sample sent," implies no warranty that the bricks should be reasonably fit for the purpose for which they were purchased, of which purpose the seller was advised. Wisconsin Red Pressed-Brick Co. v. Hood, 54 Minn. 543, 56 N. W. Rep. 165. Mere assertions of the quality or condition of a chattel at the time of sale are not a warranty, but are merely evidence of the intention of the parties as to a warranty, which is a question for the jury. Ransberger v. Ing, 55 Mo. App. 621. Plaintiff ordered from defendant certain wheels, which were warrantied against defects in material and workmanship. The wheels were constructed according to specifications, and tested in plaintiff's presence before the contract was signed. Held that, as there was no reliance on the judgment of the manufacturer that the wheels were otherwise suitable for the purpose for which they were intended, there was no implied warranty to that effect. J. I. Case Plow Works v. Niles & Scott Co. (Wis.), 63 N. W. Rep. 1013. In a sale of brick by description, there is an implied warranty that the bricks will be of good material, and made according to the description, but none that they will answer the purpose for which they were purchased. Wisconsin Red Pressed Brick Co. v. Hurd Refrigerator Co. (Minn.), 62 N. W. Rep. 550. Where defendant ordered a certain kind of tubing, which was delivered to him, it is no defense that it was not suitable for the purpose for which he wanted it, though the seller knew the use to which it was to be put, and stated that it was as good as any in the market. Jarecki Mfg. Co. Kerr, 165 Pa. St. 529, 30 Atl. Rep. 1019. Defendant agreed to ship to plaintiff a certain amount of paving stone according to dimensions set forth in specifications furnished by plaintiff. Held, that there was no implied warranty that the stone would be suitable for a particular work, in the absence of evidence that defendant knew what such work required, and agreed that the stone would be tested by its requirements. Talbot Paving Co. v. German (Mich.), 61 N. W. Rep. 655. A warranty that a threshing machine will do as good work "as any other separator of its size in the United States" is a representation that it is reasonably fit to perform the work for which it was intended. Briggs v. Rumely Co. (Iowa), 64 N. W. Rep. 784. Where the vendor makes statements as to the quality of the article, but accompanied by an express and positive refusal to warrant it, and a like notice to the vendee that he will not and does not warrant it, his statements as to quality must be deemed mere expressions of opinion, and not a contract of warranty, at least in the absence of any fraud or deceit and where the property is present for the inspection of the vendee. Lynch v. Curfman (Minn.), 68 N. W. Rep. 5. The rule in respect to an implied warranty that the work and materials furnished shall be suitable and adapted to the purpose for which they are intended has no application in respect to an alleged defect which is open, and as plainly observable to the purchaser as to the seller. Carleton v. Jenks (C. C. A.), 80 Fed. Rep. 937. An implied warranty is not that the article or thing sold shall be the best of its kind, or such as might have been represented at the time of the sale, but only that such article shall be reasonably suitable for the purpose for which it was intended to be used. Hodge v. Tufts (Ala.), 22 South. Rep. 422. During the course of a sale of personal property the vendor made statements in letters relative to the qualities and condition of the property, which were positive affirmations of facts, and not mere opinions, and which were accepted and relied upon by the vendee in making the contract of purchase of the property. Held to constitute a warranty. Burr v. Redhead, Norton, Lathrop & Co. (Neb.), 72 N. W. Rep. 1058. There was no implied warranty of fitness, under Civ. Code, sec. 1770, providing that "one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose," where such article was made according to certain stipulated plans and specifications. Bancroft v. San Francisco Tool Co. (Cal.), 52 Pac. Rep. 496. A breach of an implied warranty that goods sold are "merchantable, and reasonably suited to the use intended," may arise when the goods, because of a defect which could not, in the exercise of due caution, be detected, are totally useless and worthless, though in point of fact the seller was ignorant of the existence of such defect. Snowden v. Waterman, 100 Ga. 588, 28 S. E. Rep. 121. Where a dealer purchased a number of corncutters from the manufacturers, in the absence of any statement to the contrary in the contract, a warranty that the machines are fit for the desired use, and are in a merchantable condition, will be implied. Apha Check-Rower Co. v. Bradley (Iowa), 75 N. W. Rep. 369. A dealer who sells a piano

is bound by an implied warranty that the instrument is properly constructed, although the written contract contains no warranty, and it expressly provides that the vendor will not be responsible for any contract or promise other than those contained therein. Little v. G. E. Van Syckle & Co. (Mich.), 73 N. W. Rep. 554. Upon a sale of a domestic animal to a retail butcher, there is no implied warranty that the animal is fit for food, although the seller knows the butcher buys it for the purpose of slaughtering it and selling its flesh to his customers for food. Hanson v. Hartse (Minn.), 73 N. W. Rep. 163. An executory contract to make and deliver an article implies an agreement that it shall be fitly made for the use contemplated by both parties. Nashua Iron & Steel Co. v. Brush, 91 Fed. Rep. 213. The law of implied warranty in the sale of personalty has no application to a case where the property was sold under a contract of express warranty. Maisby v. Young (Ga.), 30 S. E. Rep. 854. A description of an article to a prospective buyer may become a warranty after a sale and acceptance, where the correspondence between the article and the description cannot be ascertained until after acceptance. Edgar v. Joseph Breck & Sons Corp. (Mass.), 52 N. E. Rep. 1083. Where a buyer gave an order for longiflorum lily bulbs on the seller's statement that he would supply him with bulbs true to name, and the seller delivered bulbs of an inferior variety, which were not distinguishable from longiflorum, it was a question for the jury whether the seller warranted that the bulbs were longiflorum. Edgar v. Joseph Breck & Sons Corp. (Mass.), 52 N. E. Rep. 1083. In order to constitute a breach of a warranty of the soundness of a mule, it is not necessary that the warrantor knew of its unsoundness at the time. Sanders v. Britton (Tex. Civ. App.), 47 S. W. Rep. 550, on rehearing, reversing judgment (Civ. App. 1898), 45 S. W. Rep. 209.

JETSAM AND FLOTSAM.

SITUS OF DEBT FOR PURPOSE OF GARNISHMENT.

There have appeared in our pages from time to time several discussions, editorial and otherwise, of the question of the *situs* of a debt for purpose of garnishment. See 1 Va. Law Reg. 241, 4 *Id.* 399, 471. In the recent case of Chicago, etc. R. Co. v. Sturm, 174 U. S. 710, the question was settled in favor of the view that if the garnishment be served upon the garnishee in the State of the latter's domicile, the principal debtor, though a non-resident and summoned by publication, is bound by the judgment sequestering the debt on behalf of the garnishing creditor; and hence, the judgment in such proceeding will protect the garnishee against an action in another State by the principal creditor.

The court declined to decide whether like effect would be given to a garnishment begun by personal service on the garnishee outside of the State of his domicile and prosecuted to judgment, since this question did not arise in the case. The reasoning of the court would, however, lead to the conclusion that the debtor may be garnished wherever his creditor (the principal debtor) might have proceeded against him.

The opinion is expressed that it is unnecessary in such case to resort to the fiction that the debt has a *situs* in any particular locality. "The essential service of foreign attachment laws," says Mr. Justice McKenna, "is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it, you must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of *situs* are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and only he, has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding in *rem*."

The court held, further, that exemption laws constitute no part of the contract, but are a part of the remedy, and are governed by the law of the forum. And hence, that in such garnishment proceeding, the question whether the principal debtor is entitled to claim as exempt the debt garnished, is one solely for the court in which the garnishment proceeding is had.

It is important to observe, however, that in the case at bar the garnishee gave notice of the pendency of the proceedings and made the defense of exemption —a duty required of him by many of the courts as a condition precedent to his right to set up the judgment in defense of a second action by his creditor. Whether this is essential or not the court declined to decide.

This case has been affirmed by the same court in an opinion reported in the last number of the Supreme Court Reporter—King v. Cross, 20 Sup. Ct. Rep. 131. In this case, Cross, of Rhode Island, instituted an action in that State against Brown, of Massachusetts, and served a garnishment on Lippitt, of Rhode Island, a debtor of Brown. Subsequently, and before judgment in the Rhode Island proceeding, Brown's assignee sued Lippitt in Massachusetts for the same debt, and garnished certain debtors of the latter in that State. Lippitt appeared in the latter suit, and pleaded the garnishment process in Rhode Island, but the court entered judgment, with a stay of execution until the Rhode Island proceedings should be settled. Thereupon, Brown's assignee, the plaintiff in the Massachusetts action, appeared in the Rhode Island proceeding and asserted his title to the debt due by Lippitt to Brown. The lower court held, however, that the Rhode Island court had properly acquired jurisdiction to sequester the debt due by Lippitt to the non-resident Massachusetts debtor; and having assumed jurisdiction prior to the assignment, and prior to the assumption of jurisdiction by the Massachusetts court, the Rhode Island creditor acquired a paramount lien on the debt due by Lippitt. This ruling the supreme court affirms on appeal citing Chicago, etc. R. Co. v. Sturm, *supra*.—*Virginia Law Register.*

CORRESPONDENCE.

THE SUPPLY OF LAWYERS.

To the Editor of the Central Law Journal:

Last Sunday a notice appeared in one of our dailies as follows: "Wanted, a lawyer, inquire at No. — Eleventh St." One of the boys who has a kind of headquarters at my office, thinking to turn an honest dollar, called at the house, said that he had seen the Ad. etc. The lady who answered the bell said, "Its all a mistake, my husband advertised for a sawyer and the paper says lawyer. You are the one hundred and eightieth lawyer that has called to-day in answer to

that advertisement." "Go west young lawyer, go west! and grow up with the country."

Denver, Colo. J. B. WILLSEA.

LIABILITY OF MUNICIPAL CORPORATION FOR TORTS.

To the Editor Central Law Journal:

In Mr. McQuillin's able paper on "Liability of Municipal Corporations for Torts in the Exercise or Non-Exercise of Public or Governmental Functions," 50 Cent. L. J. 84, the case of House v. Montgomery County, 60 Ind. 580, is cited in support of the doctrine that counties, in the absence of a statute upon the subject, are liable for a negligent failure of their officers to discharge their duties. But this case was expressly overruled in The Board of Commissioners v. Allman, 142 Ind. 573, where the court, in an exhaustive opinion, reviewed all the cases upon the subject, and held that counties, being subdivisions of the State and instrumentalities of government exercising authority given by the State, are not liable for the acts or omissions of their officers. This case is in accord with the overwhelming weight of the authorities. The Board v. Riggs, 24 Kan. 255; Watkins v. County Court, 30 W. Va. 657; Woods v. County Commissioners, 10 Neb. 552; Barnett v. County of Contra Costa, 67 Cal. 77; The Board v. Mighels, 7 Ohio St. 109; Fry v. County of Albemarle, 86 Va. 195; Scales v. Chattahoochee County, 41 Ga. 225; Clark v. Adair County; 79 Mo. 536; Downing v. Mason County, 87 Ky. 208, Askew v. Hale County, 54 Ala. 639; White v. Commissioners, 90 N. Car. 437; Templeton v. Linn County, 22 Oreg. 313; Ward v. County of Hartford, 12 Conn. 404; Commissioners v. Martin, 4 Mich. 557; Dosdall v. County of Olmstead, 30 Minn. 96; Cooley v. Freeholders, 27 N. J. L. 415; Eastman v. Meredith, 36 N. H. 284; Heigel v. Wichita County, 84 Tex. 392; Albrecht v. Queens County, 32 N. Y. Supp. 473; Smith v. Board, 46 Fed. Rep. 340; Barnes v. District of of Columbia, 91 U. S. 540; Adams v. President, etc., 1 Me. 361; Ford v. School District, 122 Pa. St. 543; Hollenbeck v. County of Winnebago, 95 Ill. 148; Brabham v. Supervisors, 54 Miss. 363; Granger v. Pulaski County, 26 Ark. 37; Wood v. Tipton County, 66 Tenn. 113; Boxter v. Turnpike Co., 22 Vt. 114.

Delphi, Ind. JOHN H. GOULD.

NOTE BY MR. MCQUILLIN.—I have read Mr. Gould's letter above. If House v. Montgomery, 60 Ind. 580, is overruled, of course Mr. Gould states a fact; but I also state a fact in saying that the rule was applied in the case, but I do not assert that the rule of the House case is the rule in Indiana. I intended to give reference to various cases, showing views of courts on the subject. That The Board of Commissioners v. Allman, 142 Ind. 573, is in accord with weight of authority, as asserted by Mr. Gould (and backed up by a long list of cases), is nothing new, for I stated the rule was so, etc. I thank Mr. Gould for information that House case has been overruled.

MCQ.

BOOK REVIEWS.

AMERICAN BANKRUPTCY REPORTS, VOL. 2.

These reports contain all the decisions made under the new bankrupt law, rendered by federal judges, by referees in bankruptcy and by State courts. Much litigation will necessarily arise in State courts on applications to stay pending proceedings. These reports are edited by William Miller Collier, author of Collier on Bankruptcy, and James W. Eaton, of the Albany, N. Y. Bar. To subscribers of these volumes of reports there will also be furnished advance sheets of these decisions in pamphlet form of what will be thereafter contained in the regular volume. The annotating of these reports seems to be very thoroughly done. There are abundant cross-references. For sale by Central Law Journal Company, St. Louis.

AMERICAN STATE REPORTS, VOL. 68.

There are an unusual number of good cases and valuable annotations in this volume. Following the decision of Barranger v. Baum, by the Supreme Court of Georgia, is an exhaustive note on the grounds on which one State may refuse to surrender a person demanded by the authorities of another. Tisdale v. Major, by the Supreme Court of Iowa, has a good note on the subject of damages for wrongful or malicious attachment. In connection with Provident Loan & Trust Co. v. Marks, decided by the Supreme Court of Kansas, is a long note on the litigation of paramount titles in a suit to foreclose a mortgage. State v. Bank of New England (Minn.), on the subject of the liability of persons holding stock as collateral is well annotated, as is also the case of Standard, etc. Co. v. Seigel Cooper Co. (N. Y.), as to when specific performance of a contract will not be decreed owing to the court's inability to enforce its decree. Kearns v. Howley, by the Supreme Court of Pennsylvania, is a well considered case (with note), on the subject of jurisdiction of equity over voluntary unincorporated associations. This excellent series of reports is published by Bancroft-Whitney Co., San Francisco.

BOOKS RECEIVED.

A Treatise by Outline, Cases and Annotations, on the Common Remedial Processes, or by Means by Which Judgments are Enforced; and Principally of Attachment, Garnishment, Executions and Replevin; and Incidentally of the Judgments Enforced, the Nature, Essentials, Record and Satisfaction of Them. Prepared Specially for Students. By John R. Rood, Author of "A Treatise on the Law of Garnishment," and an Instructor in the Law Department of the University of Michigan. George Wahr, Publisher and Bookseller, Ann Arbor, Mich., 1900. Canvas, pp. 366, Price, $3.00.

HUMORS OF THE LAW.

Jeremiah O'Leary was indicted at Cork Assizes for stealing a cow. He was found guilty, and, on being asked by the judge whether he had anything to say before sentence, he exclaimed: "The divil a word, your Honor; and its my opinion a grate dale too much has been said as it is."

The story is told that Daniel Webster, when on his way by stage-coach to Washington once, was looked upon with suspicion by his traveling companions. Finally one of the latter tapped him on the knee and said.

"How far are you going?"

"I am going to Washington," answered Webster.

"Are you a merchant?" continued the inquirer.

"No, I am a Senator," replied Webster.

"Well, well!" exclaimed the other, holding out his hand. "I am relieved. We feared you might be a highwayman."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Executors—Distribution.—Executors can maintain an action against a devisee for the restitution of property constituting assets of the estate delivered over by them under a decree of distribution subsequently reversed, though such property was not "actually delivered," but was used by them, with the consent and under the direction of the legatee, to discharge her debts.—ASHTON v. HEYDENFELDT, Cal., 59 Pac. Rep. 759.

2. ALTERATION OF INSTRUMENTS — Evidence—Mortgages.—Alteration of the date of a notary's certificate of acknowledgment, made with the consent of the parties to the instrument, and before delivery, does not affect its validity.—MILLER v. WILLIAMS, Colo., 59 Pac. Rep. 740.

3. APPEAL—Separate Judgments—Writs of Error.—Separate judgments rendered against separate parties on separate causes of action, though rendered in favor of the same party, in a proceeding involving priority of right between parties in the distribution of a fund, give rise to separate rights to prosecute error; and the parties against whom such separate judgments are rendered cannot unite in prosecuting error. There is, in such cases, a misjoinder of parties plaintiff.—CHAPMAN MFG. CO. v. TAYLOR, Ohio, 55 N. E. Rep. 1003.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—Land in Another County.—A deed of assignment which embraces land of the assignor situate in a county other than that of his residence, in order to be effective as against a subsequent *bona fide* purchaser, having at the time of the purchase no knowledge of the deed of assignment, must, by force of section 4134, Rev. St., be entered for record in the office of the recorder of the county where the land is situate. And, if such purchaser first duly enters his deed for record in the office of the recorder of that county, he will take a good title as against the assignee.—EGGLESTON v. HARRISON, Ohio, 55 N. E. Rep. 994.

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Rights of Assignee.—Under Laws 1858, ch. 314, authorizing an assignee to treat as void transfers in fraud of the rights of his assignor's creditors, an assignee for the benefit of creditors cannot so treat a chattel mortgage executed by his assignor, and recorded with the clerk of the county, because it was not filed, and was therefore void as to the mortgagor's creditors, under Laws 1883, ch. 279, § 1.—SHELDON v. WICKHAM, N. Y., 55 N. E. Rep. 1045.

6. ASSUMPSIT—Use and Occupation—Pleading.—In an action of *assumpsit* for the use and occupation of land, where the cause of action arises upon the breach of the contract, and not at the time of making the same, a plea that the defendant did not assume, as in the declaration set forth, within five years prior to the commencement of this suit, is not a proper plea. It should be that the action did not accrue within five years, etc.—ATKINSON v. WINTERS, W. Va., 34 S. E. Rep. 884.

7. ATTORNEY AND CLIENT—Power to Receive Money From Sale of Property.—Where one authorized, as agent, to sell property for a certain sum, and to receive the purchase money, makes the sale for a less sum than that authorized, and embezzles the same, the principal cannot recover the property sold without tendering to the purchaser the purchase money paid by him.—DENTZEL v. CITY & SUBURBAN RY. CO., Md., 45 Atl. Rep. 201.

8. BANK DIRECTORS—Negligence.—Action may be maintained against directors of a bank for negligence in management of its affairs resulting in loss.—FLYNN v. THIRD NAT. BANK, Mich., 81 N. W. Rep. 572.

9. BANKRUPTCY—Assets—Growing Crops.—Where a bankrupt is tenant of a farm under a contract reserving to the landlord, as rent, one-fourth of the crops raised on the land, the bankrupt's interest in growing crops, though they are immature and unsevered at the time of filing his petition in bankruptcy, is property which he might have transferred at that date, within the meaning of Bankr. Act 1898, § 70a, subd. 5, and therefore vests in his trustee as assets of his estate in bankruptcy; and after the crops have been severed the bankrupt must surrender the same to his trustee, or account for the proceeds.—IN RE BARROW, U. S. D. C., W. D. (Va.), 98 Fed. Rep. 582.

10. BANKRUPTCY—Dismissal of Proceedings—Consent of Creditors.—If one of the creditors joining in a petition in involuntary bankruptcy insists upon an adjudication being made, the court cannot dismiss the petition, if the statutory grounds for an adjudication exist, and no fraud, oppression or mistake is shown, although the other petitioners consent to its dismissal, and although it appears that it would be for the best interests of creditors that the debtor should be allowed to settle with them out of court.—IN RE CRONIN, U. S. D. C., D. (Mass.), 98 Fed. Rep. 584.

11. BANKRUPTCY—Election of Trustee—Filling Vacancy.—Under Bankr. Act, 1898, § 44, providing that the creditors of a bankrupt shall appoint a trustee "at their first meeting after the adjudication, or if there is a vacancy in the office of trustee," if a person chosen as trustee by the creditors is disapproved by the court, or declines to act, or fails to qualify, there is a vacancy in the office, and a new election must be had by the creditors, if that is practicable. An appointment cannot be made by the court unless the creditors neglect or fail to make a choice upon opportunity afforded them, when practicable so to do.—IN RE LEWENSOHN, U. S. D. C., S. D. (N. Y.), 98 Fed. Rep. 576.

12. BANKRUPTCY—Exemptions—Fraudulent Conversion.—Where a debtor, shortly before filing his voluntary petition in bankruptcy, and in contemplation thereof, sold property which was not exempt from execution, and applied the proceeds in part payment of a debt secured by a mortgage on property claimed to be exempt as a homestead, held, that the transaction was in fraud of the bankruptcy law, and that the trustee in bankruptcy, for the benefit of the creditors, should be subrogated to the rights of the mortgagee to the extent of the money so paid.—IN RE BOSTON, U. S. D. C., D. (Neb.), 98 Fed. Rep. 587.

13. BANKRUPTCY—Petitions in Different Districts.—After the filing of a petition in involuntary bankruptcy

in one district and the service of process thereon, but before adjudication, the debtor filed his voluntary petition in another district. The place of his actual residence or domicile being disputed, there was doubt as to the court which would have jurisdiction. Held, by the court of bankruptcy in the second district, that the mere pendency of the involuntary petition was not sufficient ground for dismissing the voluntary petition, but that action thereon would be stayed to await the determination of the court in the first district on the question of its jurisdiction, over the petition before it and the adjudication of the debtor thereon.—IN RE WAXELBAUM, U. S. D. C., S. D. (N. Y.), 98 Fed. Rep. 589.

14. BANKRUPTCY—Priorities—Rank of Liens.—Bankr. Act, 1898, § 64b, cl. 5, giving priority of payment out of bankrupts' estates to "debts owing to any person who by the laws of the States or the United States is entitled to priority," does not operate to place all preferred debts of this class upon a plane of equality; but liens created by the laws of the State will attach to the property of a bankrupt in the hands of his trustee in the same relative rank and order in which they are fixed by the State statutes.—IN RE FALLS CITY SHIRT MFG. CO., U. S. D. C., D. (Ky.), 98 Fed. Rep. 592.

15. BANKRUPTCY—Suits by Trustees.—A district court of the United States, as a court of bankruptcy, has jurisdiction of a bill in equity by a trustee in bankruptcy to set aside an alleged fraudulent preference made by the bankrupt. Section 23b of the bankruptcy act, providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is a limitation upon the jurisdiction of the circuit courts of the United States, and does not affect the jurisdiction in bankruptcy conferred upon the district courts by section 2 of the act.—LOUISVILLE TRUST CO. V. MARX, U. S. D. C., D. (Ky.), 98 Fed. Rep. 456.

16. BANKS—Checks and Drafts Collected After Insolvency.—A national bank, on the morning on which it was closed by the comptroller, presented to the clearing house association a large amount in checks and drafts upon other banks, a number of which had been deposited by a city and by another bank. The manager of the association received the proceeds of all such checks and drafts, and paid therefrom debts of the bank, leaving a balance to the credit of the bank. Held, that the payments must be presumed to have been made with the money of the bank, and that the remainder included that belonging to the city and the other depositing bank, and constituted a trust fund in the hands of the receiver, representing the checks and drafts the title to which remained in the depositors.—CITY OF PHILADELPHIA V. ALDRICH, U. S. C. C., E. D. (Penn.), 98 Fed. Rep. 487.

17. BANKS—False Statements in Regard to Customer.—If a bank, in order to increase its deposits or to sell its collateral, through its board of directors makes or causes to be made false statements concerning the financial condition of one of its customers, to a third person, for the purpose of misleading him, it is liable for deceit if loss results; or if, having made such statements, it conspires with its customer to make the same public, to accomplish the same purpose, it is liable to one who acts upon it to his injury.—HINDMAN V. FIRST NAT. BANK OF LOUISVILLE, KY., U. S. C. C. of App., Sixth Circuit, 98 Fed. Rep. 562.

18. BILLS AND NOTES—Firm Note.—Where a note, executed as an accommodation note, without authority, in a firm's name, by a former member, subsequent to its dissolution, but antedated prior thereto, was presented to a purchaser by the payee, the purchaser was entitled to assume, in the absence of actual notice of any defect, that the relation to the note of every party whose name had been written on it was precisely what it appeared to be.—SECOND NAT. BANK OF CITY OF ELMIRA V. WESTON, N. Y., 55 N. E. Rep. 1080.

19. BILLS AND NOTES—Legal Title—Action.—Where a guardian gave his ward's money to plaintiff to loan, plaintiff can maintain an action on the note taken in his own name therefor.—SPARKS V. COATS, Tex., 54 S. W. Rep. 918.

20. BILLS AND NOTES—Proof Against Maker's Estate.—Where the holder of a note, sought to be proved against decedent's estate, testified that no part of the principal or interest coupons attached thereto had been paid, but that decedent had paid other interest coupons, amounting to a certain sum, payment of interest being *prima facie* evidence of decedent's execution of the note, its admission against his estate was proper.—MCKAY'S ESTATE V. BELKNAP SAV. BANK, Colo., 59 Pac. Rep. 745.

21. CARRIERS — Complaint — Action.—Where there is no legal duty except that arising from a contract, there can be no election between an action on contract and one in tort, since in such case there is no cause of action in tort.—PARRILL V. CLEVELAND, ETC. RY. CO., Ind., 55 N. E. Rep. 1026.

22. CERTIORARI — Appealable Orders.—Under Code Civ. Proc. §§ 989, 1068, authorizing appeals from special orders after final judgment, *certiorari* will not lie to review an order of a trial court striking a stay bond, on appeal from a final judgment, from the files, and directing the sheriff to turn over to the judgment creditor money received by him on an execution on the judgment appealed from prior to the filing of the bond.—SOUTHERN CALIFORNIA RY. CO. V. SUPERIOR COURT OF SAN DIEGO CO., Cal., 59 Pac. Rep. 789.

23. CHATTEL MORTGAGES — Validity — Preferences.—Under Rev. St. Ohio, § 6343, which provides that all assignments in trust, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the benefit of all creditors, and which, as construed by the supreme court of the State, does not prevent the preference of creditors by chattel mortgages executed in contemplation of insolvency, the fact that a firm of insolvent debtors, prior to and in contemplation of a general assignment for the benefit of their creditors, execute separate chattel mortgages directly to each of a number of creditors at the same time, and which are filed for record at the same time, does not constitute the transaction an assignment in trust, so as to render the preferences invalid.—NATIONAL WALL PAPER CO. V. DAVIS, U. S. C. C., N. D. (Ohio), 98 Fed. Rep. 472.

24. CONSTITUTIONAL LAW — State Legislature — Vacancy.—Under Const. art. 3, § 19, providing that "each house shall be judge of the qualifications and election of its member" till the senate has decided that a vacancy exists by reason of a member becoming disqualified, the courts cannot so declare, and order an election to fill the vacancy.—COVINGTON V. BUFFETT, Md., 45 Atl. Rep. 204.

25. CONTRACT—Grain Receipt—Modification by Parol.—Upon reargument of this case this court recedes from its former ruling, and now holds that a receipt issued under the provisions of section 7646, Gen. St. 1894, for the storage of grain, cannot be subsequently modified or changed by parol.—THOMPSON V. THOMPSON, Minn., 81 N. W. Rep. 543.

26. CONTRACT — Necessary Parties.—Where two persons jointly contract with a third, both are necessary parties to an action on the contract against him.—HALLETT V. GORDON, Mich., 81 N. W. Rep. 556.

27. CONTRACTS — Parol Evidence.—A contract of sale which the purchaser had ample opportunity to read, and which provided for an absolute sale for a definite sum, without making any reference to commissions, cannot be varied by evidence of a prior parol agreement that he should have the article,—a nickel in the slot machine,—and look after it for a commission on its receipts.—PRICE V. MARTHEN, Mich., 81 N. W. Rep. 551.

28. CONTRACTS — Repudiation—Estoppel.—Defendant could not repudiate a contract signed for her by her husband on the ground that he acted without author-

ity, and at the same time retain the consideration which was given her for the contract.—PAYNE v. GIDLEY, Mich., 81 N. W. Rep. 558.

29. CONTRACT—Royalty.—A contract providing for royalty only on a certain quality of steel, other qualities are not subject to the royalty, though part of the same process enters into their production.—TODD v. WHEELER, Penn., 45 Atl. Rep. 217.

30. CONTRACT OF BAILMENT.—The written instrument set out in the opinion construed, and held to be a contract of bailment of personal property for hire, and not one of conditional sale, or sale of personal property on condition.—BAKER v. PRIEBE, Neb., 81 N. W. Rep. 609.

31. CONVERSION BY BAILEE.—A bailee, who fails or refuses to surrender trust property to the owner in accordance with the express or implied terms of the bailment, is liable in an action for conversion, unless he can show a prior lawful seizure of the property under judicial process against the owner, or some other legal and valid excuse.—WALTER A. WOOD HARVESTER CO. v. DOBRY, Neb., 81 N. W. Rep. 611.

32. CORPORATION—Contract—Ultra Vires—Annuities. —Even if, under a charter power to grant or dispose of an annuity, it should be by deed, a contract to pay an annuity, for a consideration paid, is not *ultra vires*, and therefore cannot be avoided by either party because not under seal.—CAHILL v. MARYLAND LIFE INS. CO. OF BALTIMORE CITY, Md., 45 Atl. Rep. 180.

33. CORPORATIONS—Foreign Corporations—Domicile. —Under Sayles' Civ. St. 1897, arts. 745, 746, requiring foreign corporations to file a copy of their articles of incorporation and receive a permit before transacting business within the State for profit, and providing that they can maintain no action unless they had such permit when the cause of action arose, plaintiff, a foreign corporation, not having alleged or shown that it had complied therewith, cannot maintain an action for money paid on insurance policies to defendant, which plaintiff claimed under a contract made within the State, by which the parties agreed that plaintiff's liens on the insured property should be prior to those of defendant.—DELAWARE INS. CO. v. SECURITY CO., Tex., 54 S. W. Rep. 916.

34. CORPORATIONS—Insolvent Corporations—Suit for Winding Up.—Where a suit for the winding up of a corporation is instituted by a stockholder under a State statute, it is to be regarded as adversary, and not voluntary, as to the corporation, and its character as such is not affected by the fact that the corporation offers little or no resistance to the proceeding.—HUNTINGTON v. CHESAPEAKE, ETC. RY. CO., U. S. C. C., D. (Ky.), 98 Fed. Rep. 459.

35. CORPORATIONS — Lien on Stock—By-Laws.—A by-law creating a lien on stock for debt of the stockholder to the corporation is valid, though not binding as against an innocent purchaser.—BRONSON ELEC. CO. v. RHEUBOTTOM, Mich., 81 N. W. Rep. 563.

36. CORPORATION—Mortgage.—A mortgage of a corporation to secure a prior indebtedness, not being objected to by it or its stockholders, is valid against creditors, though the statute merely empowers it, when authorized by the stockholders, to borrow money and secure it by mortgage, and the resolution of the stockholders, recited an existing indebtedness of $18,000, and provided for mortgage indentures for $18,000, the amount of the mortgage given, and authorized the officers to negotiate said mortgage loan and execute the necessary papers.—CITIZENS' STATE BANK OF STURGIS v. MCGRAFT LUMBER CO., Mich., 81 N. W. Rep. 567.

37. CORPORATIONS—Stockholders—Individual Liability.—The individual liability of a stockholder arises after a judgment has been rendered against the corporation, and when an execution thereon has been returned *nulla bona;* and in the absence of fraud on the part of the officers, such return is conclusive, and against the stockholder, that the corporation property has been exhausted.—STEFFINS v. GURNEY, Kan., 59 Pac. Rep. 725.

38. COURTS—State Courts—Patents.—A State court has jurisdiction over questions arising out of contracts made concerning patent rights, not involving the validity or infringement of a patent.—BEAVERS v. SPINKS, Miss., 26 South. Rep. 930.

39. CRIMINAL LAW—Appeal—Review.—No errors were committed by the trial court, except in failure to fully instruct the jury; and no exception was saved to the instructions given, nor was a request in writing made for other or different instructions, as provided for in section 275 of the Code of Civil Procedure.—STATE v. ASBELL, Kan., 59 Pac. Rep. 727.

40. CRIMINAL LAW—Grand Larceny—Indictment.—Indictment charging grand larceny in the first degree, in obtaining money from a railway company by falsely representing that defendant had been injured while in company's employ. Held, indictment states facts sufficient to constitute a crime.—STATE v. HULDER, Minn., 81 N. W. Rep. 532.

41. DEED—Title Conveyed—Conveyance to City for Street.—A deed of land to a city, containing apt words to convey the fee, is not reduced to the grant of a mere easement by a recital that the land "is conveyed to said city as and for a public street of said city," or by the terms of an ordinance accepting and confirming as a public street "the dedication of the land specified" in the deed; such ordinance being required by the statute for the purpose of constituting the land a public street for the care and maintenance of which the city should be responsible.—UNITED STATES v. CASE LIBRARY, U. S. C. C., N. D. (Ohio), 98 Fed. Rep. 512.

42. EJECTMENT—Adverse Possession — Fraud.—In an action of trespass and ejectment a verdict was directed for defendant on the ground that the premises, at the time plaintiff claimed to have acquired title, were in the adverse possession of another than his grantor. Defendant claimed to have been then in possession through foreclosure of a mortgage. There was evidence that defendant's mortgage was obtained by fraud, and was in fraud of creditors. Held, that the question of fraud should have been left to the jury.—RICHARDSON v. STEERE, R. I., 45 Atl. Rep. 151.

43. EJECTMENT — Fraud.—Where, in ejectment, defendant is in actual possession, and plaintiff claims that he acquired the same by fraud, the question of actual fraud is for the jury; but, where the premises are actually occupied by defendant's tenant, it is proper for the court to direct a verdict.—RICHARDSON v. STEERE, R. I., 45 Atl. Rep. 151.

44. EVIDENCE—Injury to Person on Track.—Where plaintiff did not exercise due care in crossing a track ahead of a train, admissions of the engineer, made some time after the accident, that he saw plaintiff some time before he sounded the whistle, and that he saw him before he was struck, are immaterial, as well as incompetent.—COLE v. NEW YORK, N. H. & H. R. CO., Mass., 55 N. E. Rep. 1044.

45. EVIDENCE—Res Gestæ—Declarations. — Declarations as to "how it happened," made by A, who was riding with plaintiff when he was thrown from a carriage, and who was himself thrown out a block further on, made after they had gone a block to a drug store, to one who had come the same distance after hearing of the accident, and while plaintiff's wound was being bound up, are not admissible as part of the *res gestæ*.—MAYOR, ETC. OF BALTIMORE v. LOBE, Md., 45 Atl. Rep. 192.

46. EXECUTION—Levy on Chattels—Lien.—An officer holding chattels under an execution may, without releasing them from his levy, deliver them to an assignee for the benefit of the creditors of the execution debtor, the delivery being upon an agreement between the officer and the assignee that the funds arising from the sale of the chattels by the latter shall be subject in his hands to such lien. Such arrangement is not defeated by section 3206a, Rev. St.—HUGHES v. CITY HALL BANK, Ohio, 55 N. E. Rep. 1001.

47. EXECUTION—Lien.—Where U employed H to purchase land for him, and paid the consideration, but H, unknown to U, took a deed to himself, H holds the deed in trust for U under Comp. Laws, § 8837, so that, though U, on discovering this fact, had H execute a deed to him, which he did not record for a few days, and in the meantime a creditor of H levied on the land, U is not within section 9224, providing that the lien of a levy of execution shall be valid against prior grantees of whose claims the execution creditor had no notice.—UHL v. WEIDEN, Mich., 81 N. W. Rep. 571.

48. EXECUTION — Stay — Collusive Garnishment. — Where a debtor, to delay the collection by his creditor of his claim, causes another to bring an action against his creditor, wherein he (the debtor) is joined as a garnishee, he is not entitled to a stay of execution, without bail, on a judgment against him, and in favor of his creditor, in an action brought by the latter against him subsequent to the garnishment proceedings, pending the determination of the action wherein garnishment was issued, to the extent of the amount claimed by the plaintiff in the garnishee proceedings, where the judgment exceeds that amount.—NEVIAN v. POSCHINGER, Ind., 55 N. E. Rep. 1033.

49. FRAUDS, STATUTE OF—How Pleaded.—The plea of the statute of frauds is a personal privilege, which a party may waive; and, when the action is on a contract admitted by defendant, he must interpose the special plea of the statute of frauds to make it available in his defense.—ABBA v. SMYTH, Utah, 59 Pac. Rep. 756.

50. FRAUDULENT CONVEYANCES—Creditors' Bill—Evidence.—Where it is alleged that a debtor fraudulently deposited a sum of money received by him in discharge of an obligation owing to him personally, to the credit of his wife, in a bank, the mere fact that there is a sum on deposit in such bank to the wife's credit, without evidence that it or any other sum was deposited by her husband, does not entitle the husband's creditors to relief as against the wife or the bank.—REEVES v. ESTES, Ala., 26 South. Rep. 985.

51. GARNISHMENT.—B is not liable as garnishee of P, where he was a *bona fide* purchaser from P, for $10, of a contract subject to the claim of M against P, and paid the $10, though after being served with the garnishment writ he assigned the contract to M.—MERCHANTS' NAT. BANK OF TOLEDO, OHIO, v. PANTING, Mich., 81 N. W. Rep. 579.

52. GARNISHMENT — Non-Resident Debtor. — Attachment.—Garnishment against a debtor of a non-resident defendant confers jurisdiction to render a judgment against such defendant to the extent of the debt owing him by the garnishee, though in the attachment suit in aid of which garnishment was brought the plaintiff and defendant were both non-residents, and the cause of action, on open account, accrued in another State. —E. L. WILSON HARDWARE CO. v. ANDERSON KNIFE & BAR CO., Tex., 54 S. W. Rep. 928.

53. HABEAS CORPUS—Prisoner Held by Extradition Warrant.—On the hearing of a writ of *habeas corpus* in behalf of a prisoner held by extradition warrant, the court may inquire whether an offense was charged, whether the prisoner was a fugitive from justice, and whether the purported warrant was in fact issued by the governor; and it is bound to do so when these questions are properly presented.—IN RE TOD, S. Dak., 81 N. W. Rep. 637.

54. INJUNCTION—Grounds of Relief.—Where a garnishee, after denying all liability in numerous attachments to reach an alleged indebtedness to the defendant, was sued by the defendant on the same indebtedness, in which suit the garnishee pleaded to the merits, equity would not enjoin the prosecution of such suits, and require an adjudication of all the controversies in one proceeding in equity, merely on the ground that the trial of the latter suit first would expose him to the risk of double liability, since he could have avoided the risk by pleading the pending attachments in abatement in that suit.—PENINSULA CONST. CO. v. MERRITT, Md., 45 Atl. Rep. 172.

55. INTOXICATING LIQUORS—Place of Sale—Civil Rights. —A place where intoxicating liquors are sold at retail is not within the phrase, "all other places of public accommodation and amusement," as used in section 4426-1, Bates' Anno. St., which provides for the equal accommodation of all persons at the places therein designated.—KELLAR v. KOERBER, Ohio, 55 N. E. Rep. 1002.

56. INTOXICATING LIQUORS — Taxes — Lien. — Under Muict Law (Acts 25th Gen. Assem.) ch. 62, §§ 1, 12, 18, imposing a tax on lands whereon intoxicating liquors are sold, and making such tax a lien to be enforced against the land in the same manner as provided by law for the collection of ordinary taxes by tax sale, etc., a suit in equity cannot be maintained against the owner of land subject to a lien for a delinquent muict tax to enforce such lien, since the remedy by sale of the land for non-payment of the tax is adequate and exclusive.—CRAWFORD COUNTY v. LAUB, Iowa, 81 N. W. Rep. 590.

57. JUDGMENTS—Res Judicata—Decree of Dismissal in Equity.—The decree of a court of equity dismissing a suit for an injunction is as conclusive on the parties as the judgment of a court of law, as an adjudication of a question put in issue by the pleadings, and shown to have been actually litigated and decided, and to have determined the action of the court.—STEWART v. VILLAGE OF ASHTABULA, U. S. C. C., N. D. (Ohio), 98 Fed. Rep. 516.

58. LANDLORD AND TENANT.—A landlord sent word to all his tenants to meet him at a certain time, and he would make rental contracts with them. Many were there, and he announced the terms for the ensuing year's rental, which were satisfactory. Defendant (one of the tenants) was not there, but continued to occupy his portion of the premises. No other contract with defendant was shown. Held, in an action for the rent, that there was no evidence to justify a charge that plaintiff was entitled to recover if he rented the land to defendant on the terms announced.—MAJORS v. GOODRICH, Tex., 54 S. W. Rep. 919.

59. LANDLORD AND TENANT — Lease — Operation. — Where a tenant had erected buildings on the demised premises with the consent of the original lessors, under an agreement that they were to be his property, with full right to remove them at will, and the lessors sold the premises during the term, subject to such agreement, he had a right to remove such buildings after the expiration of a subsequent lease from the purchaser of the premises before he took possession, though that lease did not mention the buildings, or the tenant's right to remove them.—HERTZBERG v. WITTE, Tex., 54 S. W. Rep. 921.

60. LANDLORD AND TENANT—Mortgage on Unknown Crop.—Where, under a tenant's contract, the title, ownership and possession of the crops are to remain in the landlord, and all indebtedness due him for advances is to be deducted from the tenant's part before division, the tenant's mortgage of ungrown crops passes no title to his mortgagee, if he subsequetly fails to request a division and delivery to himself of any part of the crop.—SAVINGS BANK OF LARCHWOOD v. CANFIELD, S. Dak., 81 N. W. Rep. 630.

61. LANDLORD AND TENANT — Security for Rent. — Where a landlord took possession of the premises under an agreement with the subtenant to sell certain of the latter's goods, and apply the proceeds to the payment of rent due up to the time of the latter's surrender of the premises, and agreed to pay any balance of such proceeds to the subtenant, such agreement operated to discharge the tenants from further liability under their lease, and terminated the landlord's right to withhold money deposited by them to secure payment of the rent for the entire period of the lease.—CARSON v. ARVANTES, Colo., 59 Pac. Rep. 737.

62. LIMITATIONS — Adverse Possession.— Where defendant claimed real property under the statutes of limitations, and before he was in possession a sufficient length of time to acquire rights under any of the

statutes his possession was interrupted for seven years, and when he resumed possession the real owners of the property were under coverture, the statutes did not begin to run again in his favor, but the break in possession was fatal to his claim.—WILLE v. ELLIS, Tex., 54 S. W. Rep. 922.

63. LIMITATIONS—Personal Injuries.—An action for personal injuries resulting from negligence merely is not within Code Pub. Gen. Laws, art. 57, § 1, prescribing a one-year limitation for actions "of assault, battery and wounding or any of them."—BALTIMORE CITY PASS. RY. CO., v. TANNER, Md., 45 Atl. Rep. 189.

64. MASTER AND SERVANT—Contributory Negligence.—A servant assumes only such risks incident to his employment as will happen in the ordinarily careful management of the business of the master. Such as arise from the fault of the master are not assumed, and the servant may recover for injuries therefrom, unless his own fault contributed to the accident.—VAN DUZEN GAS & GASOLINE ENGINE CO. v. SCHELIES, Ohio, 55 N. E. Rep. 998.

65. MASTER AND SERVANT — Injuries — Dangerous Method of Work.—Where plaintiff alleged that defendant's foreman negligently attempted to bolt certain timbers in a dangerous and extraordinary manner, and that plaintiff was injured while working thereon under the foreman's directions, it was error to instruct that it was defendant's duty to furnish its employees with a safe place to work, and for a failure thereof, causing injury to an employee, it was liable in damages, as not applicable to the facts.—SAN ANTONIO & A. P. RY. CO. v. WEIGERS, Tex., 54 S. W. Rep. 910.

66. MECHANIC'S LIEN — Claims.—Where a firm of builders entered into an agreement for the erection of a building on certain property on which they had a contract to purchase, the fact that materials were furnished to one of the members of such firm for the erection of the building, and that the other was not a party to the purchase thereof, did not release his interest in the property from liability for a mechanic's lien therefor.—REAL ESTATE & IMPROVEMENT CO. OF BALTIMORE v. PHILLIPS, Md., 45 Atl. Rep. 174.

67. MECHANICS' LIENS—Several Claimants.—Where a mechanics' lien is defeated in an action to enforce the same in the superior court, it cannot render a personal judgment in favor of the claimant for a sum less than $300, its minimum jurisdiction under Const. art. 6, § 5.—MILLER v. CARLISLE, Cal., 59 Pac. Rep. 785.

68. MORTGAGES — Conditional Sale.—Where one gives a mortgage on several lots, and thereafter conveys his equity of redemption in one only of them, the mortgagee must first exhaust the security of the other lots, the purchaser not assuming payment of part of the mortgage.—HOPPER v. SMYSER, Md., 45 Atl. Rep. 206.

69. MORTGAGE — Foreclosure — Agreement Between Bondholders.—An agreement between bondholders of a corporation which has made default, for the protection of their common interests on a foreclosure, which contemplates a purchase of the mortgaged property, if deemed necessary or advisable, is not illegal, or contrary to public policy, where it contains no provision for preventing competition at the sale, or for obtaining any unfair advantage over others.—FIDELITY INS. & SAFE-DEPOSIT CO. v. ROANOKE ST. RY. CO., U. S. C. C., W. D. (Va.), 98 Fed. Rep. 475.

70. MORTGAGES—Foreclosure—Necessary Parties.—In an action to foreclose a mortgage executed by one since deceased, an averment that the court set apart a homestead does not authorize the presumption that it had been selected prior to mortgagor's death, so that the debt must be allowed by his administrator.—BROWNE v. SWEET, Cal., 59 Pac. Rep. 774.

71. MORTGAGE—Foreclosure—Payment.—That, where a mortgagee is a purchaser of the mortgaged property at a foreclosure sale, the amount of the purchase price, is determined by his bid, if not paid over to the officer making the sale, is in legal effect so much money in his hands to be applied to the payment of his debt, according to the terms of the mortgage.—CLARK v. GAAR, SCOTT & CO., Minn., 81 N. W. Rep. 530.

72. MORTGAGES — Liens.—While a chattel mortgagor has a right to appropriate property not covered by the lien to the payment of the mortgage notes, and to place such property with an agent to be sold, and the proceeds applied on the notes, no independent act of the mortgagees or their agents could incumber with the debt the property not included in the mortgage.—SOLINSKY v. O'CONNOR, Tex., 54 S. W. Rep. 935.

73. MORTGAGE LIEN—Estoppel.—Plaintiff, to whom M gave a mortgage on land and the crop to be raised thereon, not being a party to a transaction by which M, to evidence an antecedent debt which she owed B, executed to him a note, on its face a rent note for the land, is not estopped thereby, and may show the real facts, on which B has no lien on the crop.—BOYLES v. KNIGHT, Ala., 26 South. Rep. 939.

74. MORTGAGE WITHOUT CONSIDERATION—Bona Fide Purchaser.—Though a mortgage unaccompanied by a note was without consideration, and given merely to enable the mortgagee to raise money on it, a *bona fide* purchaser thereof has a superior right to persons who were general creditors of the mortgagor when the mortgage was made and obtained judgments after the assignment.—ECONOMY SAV. BANK v. GORDON, Md., 45 Atl. Rep. 176.

75. MUNICIPAL CORPORATIONS—Defective Sidewalks—Ice and Snow.—Under Gen. Laws, ch. 72, § 13, requiring notice to a city before it can be held liable for injuries caused by snow or ice on a sidewalk, a city is not liable, in the absence of notice, without proof that the injury would not have occurred but for some defect independent of the ice or snow; and hence a verdict for plaintiff for injury caused by slipping in a gutter, defectively maintained to carry water across a sidewalk, without notice having been given, was not justified where it was proved that a heavy snowstorm occurred just before the accident, and that the ice on which plaintiff slipped was rough and "ridgy;" such proof indicating that the injury was due to the snowstorm, and not to the defect in the walk.—ALLEN v. COOK, R. I., 45 Atl. Rep. 148.

76. MUNICIPAL CORPORATIONS — Estoppel to Avoid Contract.—Where a city election called for the purpose of voting on the ratification of an ordinance entering into a contract with the water company was called and held at a single voting place, as had been the custom for a number of years, instead of at separate places in each ward, the city cannot avail itself of such fact to defeat the contract after the result of the election in favor of the ordinance has been declared by the proper officers, and the company has been notified of such result, and has accepted the ordinance and fulfilled the contract on its part.—CREBS v. CITY OF LEBANON, U. S. C. C., W. D. (Mo.), 98 Fed. Rep. 549.

77. MUNICIPAL CORPORATION—Public Improvements.—The owner of municipal property, upon which valid assessments have been made for the purpose of a general scheme of improvement, as the laying out and grading of streets, may, in case of a failure on the part of the city to finish its work and an abandonment of the same, recover his share *pro tanto* of the sum so unexpended, in an action for money had and received.—GERMANIA BANK v. CITY OF ST. PAUL, Minn., 81 N. W. Rep. 542.

78. MUNICIPAL CORPORATION — Statutes — Constitutionality.—Under Const. art. 3, § 55, prohibiting the legislature from extinguishing the whole or any part of the indebtedness of any corporation or individual to the State or any municipal corporation, a city is entitled to raise the question of constitutionality of a statute of limitation barring recovery for taxes assessed by it.—OLLIVIER v. CITY OF HOUSTON, Tex., 54 S. W. Rep. 940.

79. NEGLIGENCE — Electric Light Companies.—An electric light company which brings a high-tension wire within a few inches of a house, where it is defectively insulated, is liable to a person injured therefrom

while engaged in a lawful occupation about the house; contributory negligence not being shown.—BROWN V. EDISON ELEC. ILLUMINATING CO. OF BALTIMORE CITY, Md., 45 Atl. Rep. 182.

80. NEGLIGENCE — Injuries Resulting from Fright—Damages.—Where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof.—GULF, ETC. RY. CO. V. HAYTER, Tex., 54 S. W. Rep. 944.

81. NEW TRIAL—Newly-Discovered Evidence—Cumulative.—Where it does not appear that a trial judge has exceeded his powers in denying a motion for a new trial based on newly-discovered evidence, and such evidence is only cumulative or relatively unimportant, in view of the whole case, exceptions thereto will be overruled.—FREEMAN V. CITY OF BOSTON, Mass., 55 N. E. Rep. 1048.

82. NOTE—Extension—Release of Surety.—A promise to pay interest on an interest-bearing note after maturity is not a sufficient consideration to support an agreement of the payee to extend the time of payment, so as to discharge the surety thereon.—SHAYLER V. GARNER, Mich., 81 N. W. Rep. 549.

83. OFFICE AND OFFICERS—Mandamus — Quo Warranto.—When an office is filled by an actual incumbent, exercising its functions *de facto* and under color of right, *mandamus* will not lie to compel him to turn over the books of the office to another, the question of title to the office being involved; *quo warranto* being the proper remedy.—ASHWELL V. BULLOCK, Mich., 81 N. W. Rep. 577.

84. OFFICERS—Lucrative Office—Coroners.—The office of coroner is a lucrative office, within Rev. St. § 5095, which prohibits a person holding a lucrative office from being interested, directly or indirectly, in any contract with the State, county, etc., in which he exercises any official jurisdiction.—BAKER V. BOARD OF COMRS. OF CROOK CO., Wyo., 59 Pac. Rep. 797.

85. PARTNERSHIP—Assignment—Accounting.—One to whom a partner who is entitled to an accounting and settlement of the partnership, assigned a definite amount of his share of the profits, with the consent of the other partner, may maintain a suit against the latter for an accounting.—BRUNS V. SPALDING, Md., 45 Atl. Rep. 194.

86. PARTNERSHIP NAME — Fictitious Name. —Where the firm name in which a co-partnership transacts business in the State contains the surnames of all the members of the firm, and none other, it is not "a fictitious name or designation not showing the names of the persons" who constitute the firm, within the meaning of the statute requiring a certificate to be filed with the clerk showing the full names of such persons.—CZATT V. CASE, Ohio, 55 N. E. Rep. 1004.

87. PLEDGES — Insurance Policy — Surrender by Pledgee.—Assured and wife assigned a policy to decedent to secure payment of a note, and authorized such assignee to surrender the policy and apply the proceeds to the payment of the note if the same was not paid on maturity, but after failure to pay the note at maturity, decedent, by his conduct and by verbal assurances, induced the family of assured to believe that the note would not be enforced, or the policy surrendered, without notice. Held, that though decedent was entitled, under the agreement, to surrender the policy without notice, yet his conduct constituted a waiver of such right, and a surrender thereafter without notice constituted a conversion.—TOPLITZ V. BAUER, N. Y., 55 N. E. Rep. 1059.

88. PRINCIPAL AND AGENT — Agent to Purchase.—Where plaintiff's agents purchased wheat for him as such agents, which they subsequently refused to deliver, title to the wheat passed to plaintiff immediately on its purchase, and he was, therefore, entitled, in an action against such agents, to recover such profit as he might have made by a subsequent sale thereof.—NADING V. HOWE, Ind., 55 N. E. Rep. 1032.

89. PRINCIPAL AND AGENT—Notice to Agent.—Notice to an agent, to constitute constructive or implied notice to the principal, must be of facts within the scope of the agency, or of or concerning business engaged in by the agent by the authority of the principal.—JACKSON V. MUTUAL BEN. LIFE INS. CO., Minn., 81 N. W. Rep. 545.

90. PRINCIPAL AND AGENT—Traveling Salesman—Authority.—A traveling salesman has not, as agent for his principal, in the absence of custom or usage, authority to collect for the goods previously sold by him. —BROWN V. LALLY, Minn., 81 N. W. Rep. 538.

91. PRINCIPAL AND AGENT—Unauthorized Contract of Agent.—A principal must adopt the unauthorized contract of his agent as a whole or not at all. He cannot adopt the portion that is beneficial and reject the remainder.—CITIZENS' STATE BANK V. PENCE, Neb., 81 N. W. Rep. 623.

92. PRINCIPAL AND SURETY—Judgment Against Sureties—Assignment.—Where a judgment creditor assigned the judgment against the principal and sureties on a bond to certain of the sureties, authorizing them to enforce it in his name, the assignees, on filing the assignment with the clerk, were entitled to execution against a co-surety to enforce contribution, though they had filed no notice of payment of the judgment nor claim for contribution, and no entry of such notice had been made by the clerk in his docket, as required by Code Civ. Proc. § 709, authorizing the enforcement of contribution between sureties on filing and entry of such notice, since such section does not apply to the assignment of judgments.—WILLIAMS V. RIEHL, Cal., 59 Pac. Rep. 762.

93. PRINCIPAL AND SURETY—Official Bond.—Where one signed an official bond as surety on the condition, known to the obligee, that it was not to bind him unless others jointly became sureties with him, he is not liable thereon unless the condition is performed.—STATE V. WELBES, S. Dak., 81 N. W. Rep. 629.

94. RAILROAD COMPANY — Licenses.—In an action for personal injuries, it appeared that defendant railroad permitted the public to use a path crossing its premises. Plaintiff, while walking on the path at night, became confused by a car standing on the track across the path, and, on attempting to go around the car, fell into a pit maintained by defendant under its tracks, which was not concealed, except by the darkness. Held, that plaintiff was not entitled to recover, since he was a mere licensee, and defendant owed him no duty except not to injure him willfully.—LINGENFELTER V. BALTIMORE, ETC. RY. CO., Ind., 55 N. E. Rep. 1021.

95. RAILROAD COMPANY—Street Railroads — Use of Streets or Highways.—It is the settled law in Illinois that the construction of an electric railway on a street or highway imposes no additional servitude, whether the fee in the street or highway is in the municipality or in the abutting owner; and, where the right to construct such road is granted by the public authorities, an owner of abutting property has no standing in a court of equity to enjoin the same.—RANKEN V. ST. LOUIS & B. SUBURBAN RY. CO., U. S. C. C., S. D. (Ill.), 98 Fed. Rep. 479.

96. RECEIVERS — Foreign Corporations — Resident Creditors.—The banking law, requiring a foreign corporation wishing to transact business in the State to deposit a certain amount, and providing that on the appointment of a receiver of the corporation in the State the deposit shall be paid to him, to distribute among the resident creditors and shareholders, creates a trust in such fund for the benefit of such residents; and the statute does not violate the constitutional provision granting the citizens of each State all the privileges of the citizens of the several States,

since the corporation, by accepting the conditions of the statute, has given its consent to its terms.—PEOPLE v. GRANITE STATE PROVIDENT ASSN., N. Y., 55 N. E. Rep. 1053.

97. REMOVAL OF CAUSES—Diversity of Citizenship.—A cause is not removable by a defendant on the ground of diversity of citizenship alone where some of his co-defendants, who are interested adversely to each other in some of the questions involved, are citizens of the same State.—GATES IRON WORKS v. JAMES E. PEPPER & Co., U. S. C. C., D. (Ky.), 98 Fed. Rep. 449.

98. REMOVAL OF CAUSES—Federal Question.—To bring a case within the jurisdiction of a circuit court of the United States, under the judiciary acts of 1887 and 1888, on the ground that it arises under the constitution or laws of the United States, the plaintiff must claim some right under such constitution or laws which he seeks to enforce in the action; and a petition in a State court based upon a State statute, although its sufficiency is challenged by defendant by demurrer, without any additional averments in defense, upon a ground found in the federal constitution, does not disclose a case arising under such constitution which is removable by defendant.—SHIELDS v. BOARDMAN, U. S. C. C., N. D. (Ohio), 98 Fed. Rep. 455.

99. REMOVAL OF CAUSES—Separable Controversy—Suit to Quiet Title.—A suit to quiet title, brought in a State court, against a number of defendants, for the purpose of obtaining an adjudication of all claims adverse to complainant which may exist in favor of any of the defendants, is severable as to each defendant; and a defendant who is a citizen of a different State from complainant may remove the cause, as against him, to the federal court, where the requisite amount is involved.—BATES v. CARPENTIER, U. S. C. C., N. D. (Cal.), 98 Fed. Rep. 452.

100. REPLEVIN AGAINST SHERIFF—Notice of Interest.—In replevin against a sheriff to recover attached property, a notice of ownership, not stating the consideration on which plaintiff acquired his interest in the property, as required by Code, § 3906, which notice is expressly required by Code, § 3991, to render the sheriff liable, is properly excluded from the evidence.—MCIVER v. DAVENPORT, Iowa, 81 N. W. Rep. 585.

101. SALES—False Reresentations.—It was for the jury to determine whether representations made by one selling hogs were intended as an affirmation of the soundness of the hogs or as a mere expression of opinion.—COLE v. CARTER, Tex., 54 S. W. Rep. 914.

102. SALES—Rescission—Fraud.—Where a seller brought replevin for goods, after rescinding the sale, against the buyer and his transferee, on the ground that the seller had been induced to make the sale by fraud, it was not error to refuse an instruction that the jury should return a verdict against the buyer for the value of the goods in any event, since he was only liable for the contract price.—HALFF v. WANGEMANN, Tex., 54 S. W. Rep. 937.

103. SCHOOLS AND SCHOOL DISTRICTS—TAX.—Where the electors of a school district vote to levy a schoolhouse tax, they may rescind the same at the next regular election, when the tax has not been certified or levied by the school board, though one of the electors has commenced an action to compel the board to certify and levy such tax.—HIBBS v. BOARD OF DIRECTORS AND SECRETARY OF DISTRICT TOWNSHIP OF ADAMS, MAHASKA COUNTY, Iowa, 81 N. W. Rep. 584.

104. SPECIFIC PERFORMANCE—Mutuality of Contract.—Where a contract by a corporation to convey land was, on its face, obligatory on both parties, the fact that the corporation had made a declaration of trust of such property to secure its indebtedness to a third party, in which it agreed not to convey the property without such third party's written consent, will not render such contract void for want of mutuality; the agent of the corporation acting also as agent of such third party in making such contract to convey, and the third party having joined in the conveyance tendered defendant.—MARYLAND CONST. CO. OF BALTIMORE CITY v. KUPER, Md., 45 Atl. Rep. 197.

105. TAXATION—Exemptions.—Property used directly, immediately and exclusively for religious purposes is exempt from taxation, without regard to the question of absolute ownership.—SCOTT v. SOCIETY OF RUSSIAN ISRAELITES, Neb., 81 N. W. Rep. 624.

106. TAXATION—Jurisdiction to Enjoin Collection of Tax.—A court of equity cannot enjoin the collection of a tax on the ground that it was assessed without due notice to the complainant, unless it is also made to appear that it is greater than should have been assessed, so that upon a hearing he would have been entitled to a reduction of the amount.—MERCANTILE NAT. BANK OF CLEVELAND, OHIO, v. HUBBARD, U. S. C. C., N. D. (Ohio), 98 Fed. Rep. 465.

107. TAX DEEDS—Description—Record.—Record of a tax deed being but *prima facie* evidence of compliance with the statute, plaintiff was not prejudiced by the issuing of a second tax deed to defendant, since plaintiff had the same right to rebut the presumption of compliance under the latter as the former.—DUGGAN v. MCCULLOUGH, Colo., 59 Pac. Rep. 743.

108. TOWNS—Liability for Indebtedness—Contracts.—A township is not liable for an indebtedness which is not created by a vote of its electors, nor ratified by them.—FRENCH v. TOWNSHIP OF SOUTH ARM, Mich., 81 N. W. Rep. 557.

109. TRUST—Express Trust—Rights of Beneficiaries.—Express trusts are created by contracts and agreements which directly and expressly point out the persons, property and purposes of the trust. Implied trusts are those which the law implies from the language of the contract and the evident intent and purpose of the parties. Within this definition it is held that the transaction set out in the opinion created an express trust between the parties.—IN RE WELLE'S ESTATE, Minn., 81 N. W. Rep. 549.

110. WATERS AND WATER COURSES—Pollution—Municipal Corporations.—Where sewer commissioners appointed under a legislative act obtained their powers from the charter of a city for which they were appointed, the city is liable for their acts within the scope of their authority.—PLATT v. CITY OF WATERBURY, Conn., 45 Atl. Rep. 154.

111. WILLS—Construction of Bequest—Conditions.—Where a bequest to a religious library association was "upon condition that said association agrees" to pay an annuity to the wife of the testator, during her life, and upon her death to apply the income from the fund to specified purposes in connection with its library, the agreement to pay the annuity is not such an absolute condition that the bequest is defeated by the death of the annuitant before the time for its taking effect arrives.—SHERMAN v. AMERICAN CONGREGATIONAL ASSN., U. S. C. C., D. (Mass.), 98 Fed. Rep. 495.

112. WILL—Vesting of Estate.—Under a will devising the estate to trustees, to manage in their discretion, and to sell, and reinvest the proceeds for the sole use of testator's wife during her life, and after her death to divide the same equally among his children, who are named, "or the survivors of them, and the heirs of any of them who may meanwhile have died, the children of any of them taking under this devise the parent's portion," making all such sales as may be required, the gifts to the children do not vest till after the death of the widow, and then only in those surviving her and the children of those dying previously, free from any liabilities of those so dying.—SMALL v. SMALL, Md., 45 Atl. Rep. 190.

113. WILLS—Witnesses—Attorney and Client.—An attorney who drew decedent's will, and was a subscribing witness thereto, is qualified to testify as to its contents in an action between decedent's heirs and his devisees, though Burns' Rev. St. 1894, § 505, prohibits attorneys from testifying to communications by clients, made in the course of business; since such rule does not apply after the client's death.—KERN v. KERN, Ind., 55 N. E. Rep. 1004.